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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 135

JULIUS L. ECHELES and
PAUL ECHELES,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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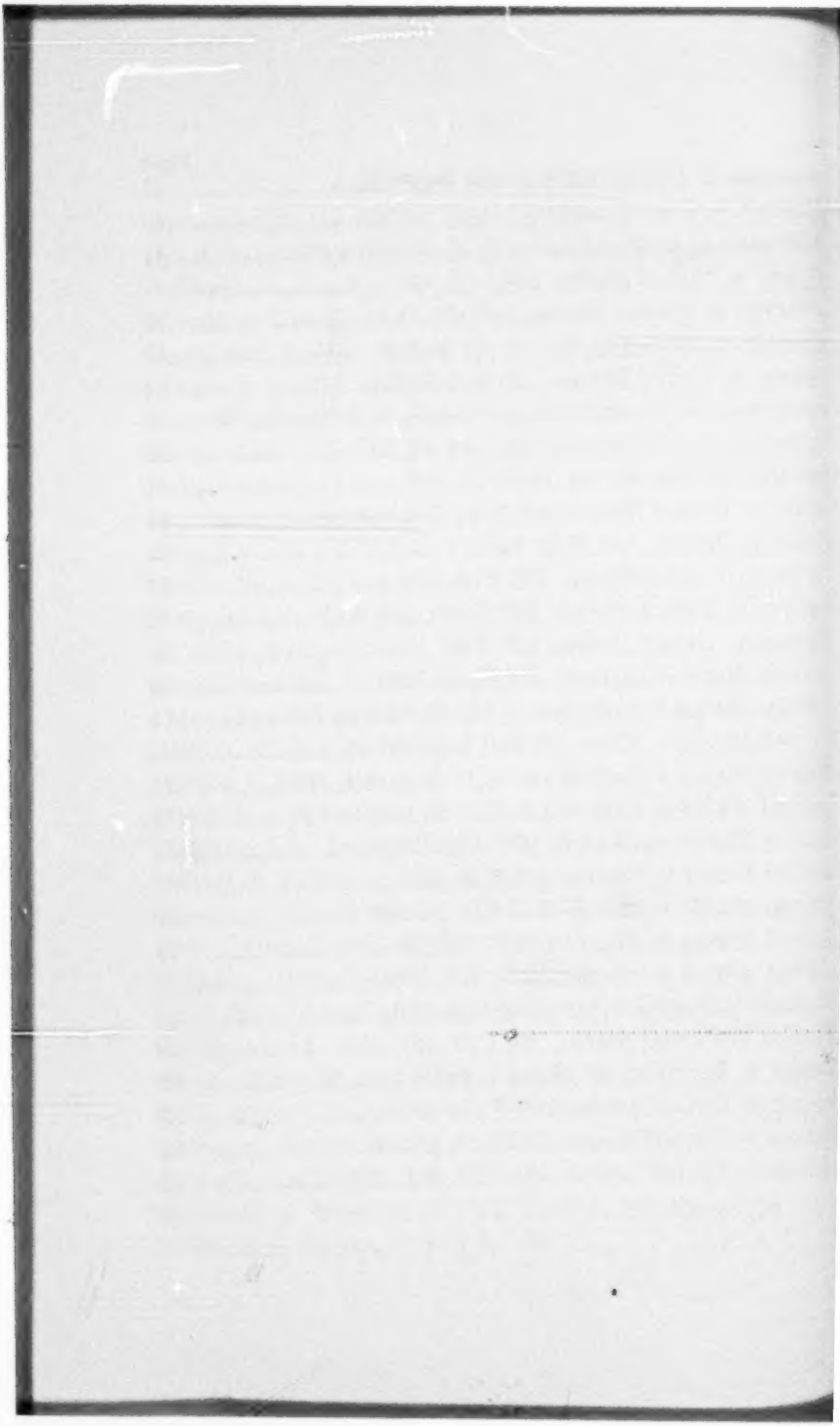

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Julius L. Echeles and Paul Echeles, respectfully pray that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit in the above entitled case.

Opinion of the Courts Below.

The judgment and sentence of the United States District Court for the Northern District of Illinois, Eastern Division was entered on February 23, 1954. The District Court's judgment is not reported but is printed in the Record filed herewith.

The majority opinion of the Court of Appeals for the Seventh Circuit affirming the judgment of the Lower Court was filed April 20, 1955. The opinion is not yet reported but is set out in full in the Appendix hereto at pages 47-75. The dissenting opinion by Circuit Judge Major is printed in the Appendix hereto at pages 75-76. Both the opinion and the dissent thereto are set forth fully in the certified copy of the Record as transmitted to this Court.

Jurisdiction.

The judgment of the Court of Appeals sought to be reviewed was entered April 20, 1955. The petition for a rehearing was denied on May 10, 1955. This Petition for Certiorari is filed within 30 days of the denial of the Petition for Rehearing.

The jurisdiction of this Court is invoked under Title 28, U.S. Code, Sec. 1254(1) and Rule 19(b) of the Rules of this Court.

Questions Presented for Review.

1. Is not a conspiracy count fatally defective and duplicitous when it charges a conspiracy to commit a misdemeanor and a conspiracy to commit a felony in one count, in view of Secs. 1 and 371, Title 18, U.S. Code under which a conspiracy to commit a felony is a felony and a conspiracy to commit a misdemeanor is a misdemeanor? This precise point has been passed on by no court (other than 7th Circuit in this case) since the adoption of Sec. 371, Title 18 in 1948. Previous to this, conspiracy to commit even misdemeanors was classified as a felony.

2. Was it proper for the trial court to have given an instruction on presumption of innocence which in effect took away that presumption from the defendants, when the court told the jury the presumption disappeared as soon

as the jury found any of 3 defendants guilty of any one of 13 counts?

3. Was not the jury required to be instructed, as requested, that the testimony of one accomplice witness cannot corroborate the testimony of another accomplice witness where the whole of the government's case depended on accomplice witness' testimony exclusively; and where the reviewing court, in order to sustain the convictions on counts 3, 4, 5 and 11 used the testimony of one accomplice to corroborate another?

4. Where a confession is introduced over objection, is it not reversible error to refuse to instruct the jury, as requested, that the weight of the confession is for the jury to decide?

5. Even though the court admits a confession into evidence, over objection, is it not the duty of the court to instruct the jury, as requested, that the question of whether or not the confession was voluntarily made or coerced is for the jury to decide? If the court rejected two tendered instructions of the defendant as inappropriate to the facts, was it not still the duty of the court to instruct the jury properly on this vital issue?

6. Whether it is proper for the judge to instruct the jury that it must not consider written statements against a co-defendant, made outside his presence and not in furtherance of the conspiracy, but that this limitation applies only to *written* statements and not to *oral* statements, where the Record shows many such oral statements by two co-defendants?

7. Under the circumstances of this case, where both co-defendants made statements, written and oral, outside the third co-defendant's presence, was not the third defendant entitled to a separate trial, when he so moved timely before the trial, and when the motion was renewed when the

district attorney called to the attention of the court before trial the possibility of a conflict of interest between the third defendant and of the other defendants?

8. Is it not error to admit into evidence a written confession, over objection, when that confession was obtained by 8 or 9 hours of incessant grilling, where the confessor was held incommunicado, deprived of food and water, not advised of his constitutional rights, and where he was subjected to psychological and economic duress and pressure?

9. Was it not a violation of Rule 5, Federal Rules of Criminal Procedure, to hold the defendant illegally for the purpose of questioning and grilling, instead of taking him before the U. S. Commissioner as required by the above Rule? Does the fact that the defendant was released after a written statement taken from him excuse the federal officers from complying with the Rule; and is not the confession to be excluded therefor because taken in violation of the clear mandate of the Rule and in violation of the holding of this court in the cases of *McNabb* v. *United States,* 318 U.S. 332, and *Upshaw* v. *United States,* 335 U.S. 410? This precise question has never before been raised in this manner.

10. Were not the defendants entitled to their right to compulsory process under the Sixth Amendment? Is the quashing of defendants' subpoenas for documents because they were voluminous proper under Rule 17(c), Federal Rules of Criminal Procedure? Is it not reversible error when the judge finally allows one subpoena during the trial after 5 of the 6 government witnesses had already testified and left the stand, where the documents sought tended to impeach the testimony of the witnesses? Is not this right to compel the production of documents so fundamental that all doubts as to their issuance should be resolved in defendants', and not the government's, favor?

11. Where the gist of the crime charged in count 11 is a promise of money to a public official to influence him, did the evidence show the existence of the *corpus delicti* outside the confession of one defendant?

As to the other defendant, against whom the confession could not be used, was there any evidence to prove the gist of the crime, *i.e.*, the *promise* to the postmaster?

12. Is it not a cardinal rule of criminal law that a defendant must be identified in open court as having committed the act complained of? If a defendant is identified in connection with one count by a witness, is it sufficient identification for another count, being an entirely different transaction at a separate time and place, where the second witness is not even asked to identify the defendant as to the second count?

13. Is a promotive office an appointive office or place as contemplated by Sec. 215, Title 18, U.S. Code, where all of the state cases on this point hold they are not and where there are no federal cases decided on this point which is raised here as a new question for this Court to decide.

14. Were the defendants afforded a fair trial according to due process of law where the court restricted cross-examination, disparaged defense counsel, restricted defense witness from rebutting testimony of government inspector, and where the prosecutor misled the court?

Statutes and Rules Involved.

The following Articles of the Constitution and pertinent provisions of the federal statutes and criminal code involved are:

Fifth Amendment to Constitution of United States.
Sixth Amendment to Constitution of United States.
Rule 5, Federal Rules of Criminal Procedure, Title 18, U.S. Code.

Rule 8(a), Federal Rules of Criminal Procedure, Title 18, U. S. Code.
Rule 17(c), Federal Rules of Criminal Procedure, Title 18, U. S. Code.
Section 1, Title 18, U. S. Code.
Section 201, Title 18, U. S. Code.
Section 215, Title 18, U. S. Code.
Section 371, Title 18, U. S. Code.

These provisions are set out in full in the Appendix hereto.

STATEMENT OF THE CASE.

Petitioners were charged in 13 counts with violations of Sections 201, Title 18, U.S. Code and 215, Title 18, U.S. Code pertaining to soliciting or receiving money for promises of support in obtaining postal positions, and for promising money to effect the decision of the postmaster in Chicago; and further with conspiring to commit said substantive offenses in a final count of the indictment in violation of Sec. 371, Title 18. A third defendant charged only in the conspiracy count, was discharged by the jury. Petitioners were sentenced to a term of imprisonment for an aggregate term of 28 months, and were fined an aggregate sum of $2750.00.

The Court of Appeals for the Seventh Circuit confirmed petitioners' convictions as to counts 2, 3, 4, 5, 6, 8 and 9, being counts charging substantive misdemeanors, count 11 charging a substantive felony and count 13 charging conspiracy to commit the offenses charged in the first 12 counts. The Circuit Court reversed as to count 1, a substantive misdemeanor, and counts 10 and 12, substantive felonies as to both defendants, and further as to count 7, a substantive misdemeanor as to defendant, Julius Echeles. The sentences were accordingly cut to 22 months for each defendant and the fines reduced. Count 7 was not reversed

as to defendant, Paul Echeles. The Circuit Court denied the Petition for Rehearing on the 10th day of May 1955.

Government witness Lester Barrett testified to the procedure in making postal promotions at the postoffice in Chicago. (R. 84-87)

Government witness Richard Bonga testified as to counts 8 and 9. He said that petitioner, Paul, sent him to petitioner, Julius telling him that a promotion would cost money (R. 127); that he then returned to Julius' law office and gave him $800.00 which was later returned to him by Paul (R. 132). At a subsequent time he gave Julius $500.00 which was again later returned by Paul (R. 133-134). On cross-examination he admitted making statements prior to his testimony in court, which exonerated the defendant from any blame, and that he was cooperating with the officials with the hope of keeping his job, and that he had previously asked for and received political assistance in his efforts to get promoted. (R. 135-167.)

Government witness Russell Isom testifying as to counts 6 and 7 said petitioner, Paul, sent him to petitioner, Julius, with whom he left money which was later returned to him by Paul; that thereafter he again gave Paul the money which was returned to him. (R. 170-79) He had sought and obtained other assistance to get promoted (R. 180-3). Also, he was doing the work, but not getting the pay for the job he sought. (R. 183)

Government witness Morris Lazik testified as to counts 2 and 11 that Paul introduced him to Julius who told him what a promotion would cost; that he then gave Paul $750.00 in notes and cash; he later was promoted and gave money to Paul for the outstanding note. (R. 215-19) He sought and received political help in his prior promotions and toward this promotion. (R. 220-222) He was doing the work of a supervisor for 18 years, but not getting the pay.

(R. 222). He admitted giving the inspectors a sworn affidavit at first that he paid no one any money. The inspectors destroyed this affidavit (R. 220). Later, the postal inspectors took him from his bed in the middle of the night, whereupon he changed his affidavit. (R. 227.)

Government witness Morris Berman testifying as to count 4 said he talked to Paul, went to Julius, who told him what a promotion would cost and that he thereafter gave money to Julius which Paul subsequently tried to return to him; that he wanted Paul to keep the money, but that later Paul did return his money to him. (R. 234-241). He obtained letters from other lawyers who wrote to the postmaster for him. (R. 245.)

Government witness Ervin Boese testifying as to count 5 said that he saw Paul who sent him to petitioner, Julius, who told him it would take $850.00 to be promoted; that he never gave either Julius or Paul any money. (R. 255-8). A number of elected officials had written letters to the postmaster for him (R. 258-60).

Government witness Isadore Stern, testifying as to counts 3 and 12 said that petitioner, Paul, sent him to petitioner, Julius, who told him that a promotion would cost money, and that it would be done through a north side politician "not mentioning any names" (R. 281); that he paid money to Julius and was promoted thereafter to the same job that he was holding at the time of his testimony. (R. 282.) On cross-examination he admitted important differences between an affidavit he gave the postal inspectors and his testimony in court, in that he omitted features of his court testimony from the affidavit. (R. 284-288). Previously he had a U. S. Congressman contact a local ward committeeman to help him get promoted. (R. 289-90.) He was actually doing the promotion job work without the pay, for 8 or 9 years. (R. 292)

Government witness postal inspector Vernon Peterman, testified that he and postal inspector Smith interviewed petitioner Paul for 7½ to 8 hours; that Paul first denied any complicity in an offense, but upon further interrogation admitted that he assisted in obtaining postal promotions for a number of people. Paul avoided mentioning the name of the appointing official, referring to him as the appointing official. After many hours of discussion, Paul made a slip of the tongue in the presence of the witness inspector Smith, using the words "the postmaster, Mr. Haderlein". (R. 320-26) Upon cross-examination he testified that he had no warrant for petitioner Paul's arrest, nor did he take him before the United States Commissioner, gave him nothing to eat or drink during the confinement. (R. 329-334)

Government witness postal inspector Raphael A. Smith testified that during Paul's interrogation, Paul did not want to mention the name of Haderlein in his written statement and the witness agreed not to put it in or even to talk to him about it, but Paul told him orally when the other postal inspector Peterman was out of the room that he, Paul, had given the money to "John Haderlein, the postmaster." (R. 344-46) He testified that he interrogated Paul about 8 hours, during the first part of which Paul denied complicity in any criminal transactions. Paul told him about his relationship with the postmaster but wanted it kept out of the statement and that none of that information, to which the witness testified in court as to his relationship between Paul and the postmaster appears in the statement (R. 358) He testified that Paul was not under arrest, but said that he, the witness, called Paul's insurance office and told the girl that Paul would not keep an appointment there, and that he "permitted" Paul to call home, instructing him as to what he should and should not say, monitored the call, and told Paul he would cut him off

if Paul told his wife any reason for Paul's not being home. (R. 369-371)

Mrs. Belle Echeles, petitioner Paul's wife, sought to testify to the contents of the telephone conversation between herself and her husband when Paul was being held by the postal inspectors (R. 466). The government's objection to the conversation was sustained (R. 466). The defense made an offer of proof to the effect that if permitted to testify, the witness would testify that the content of the call differed from that testified to by the postal inspector. The court's ruling stood (R. 466). The witness was then asked, not what she said to the witness via the telephone but solely "what did he say to you" (R. 466), Paul then being in the presence of the postal inspectors and they having testified to his alleged conversation. The government objection to the question was sustained (R. 466), the government claiming that the objection went to the materiality of the testimony (R. 467). The witness was not permitted to testify as to her husband's condition when she saw him after he had been released by the postal inspectors. (R. 466-7)

Defense witness Miriam T. Collins testified that she was employed by petitioner Paul, and that postal inspector Smith called her by telephone, telling her that Paul would not keep his appointment at his insurance office. (R. 467-8)

Defense witness, John Haderlein, testified he was postmaster in Chicago during the period referred to in the indictment and that neither Paul nor Julius Echeles ever gave or promised him any money to influence his decision with regard to any official matter, and that he never knew or met Julius. (R. 472-80)

REASONS FOR ALLOWANCE OF THE WRIT.

I.

The indictment charged two conspiracies in Count 13, one a felony, the other a misdemeanor. The conspiracy count was therefor, bad for duplicity.

Count 13 of the indictment charged petitioners with conspiring to commit the substantive offenses charged in the 12 previous counts. Nine of those counts charged substantive misdemeanors. The rest charged substantive felonies.

Rule 8(a), Federal Rules of Criminal Procedure, (Appendix 78) permits joinder of separate offenses in separate counts. But joinder of separate offenses in a single count is not permissible and the rule forbidding it is called "elementary". *United States* v. *Dembowski,* 252 Fed. 894, 897.

If a count is constructed so that the matters charged therein would, if alleged in separate counts, subject the defendant to separate punishments, the count is bad for duplicity. *Bratton* v. *United States,* 73 F. 2d 795, 797, *Creel* v. *United States,* 21 F. 2d 690, 691, *Ammerman* v. *United States,* 216 Fed. 326, 329, *John Gund Brewing Company* v. *United States,* 204 Fed. 17, 21.

Section 1, Title 18, U.S. Code divides offenses into separate grades, felonies and misdemeanors, depending on the penalty which can be imposed for violations. (Appendix 79). Section 371, Title 18, U.S. Code, is the conspiracy section under which Count 13 of the indictment was laid. It provides a felony punishment for conspiring to commit felonies, a misdemeanor punishment for conspiring to commit misdemeanors (Appendix 79). Taken with Section 1, Title 18, then, conspiracies are of two grades, felonies and misdemeanors.

Count 13 charges a conspiracy to commit the offenses charged in the first 12 counts, that is, it charges a conspiracy to commit both felonies and misdemeanors. Had it been alleged in two counts, one charging a conspiracy to commit the felonies and the other charging a conspiracy to commit the misdemeanors, defendants would have been subject to separate penalties for each, hence the count is duplicitous.

We do *not* complain that the count is duplicitous because of the diversity of the alleged objects of the conspiracies charged. We base our complaint upon the fact that the Congress created two separate *grades* of conspiracies, that a felony conspiracy is separate and distinct from a misdemeanor conspiracy, but that notwithstanding, the defendants were charged with both in one count.

• • •

Until 1948, no distinction was made between conspiracies to commit felonies and conspiracies to commit misdemeanors. The same penalty was imposed for a conspiracy violation without respect to the object of the conspiracy (former Section 88, Title 18, U.S. Code). Under the 1948 enactment, a distinction was established in the punishment provision, based upon the *object* of the conspiracy, whether felony or misdemeanor, Section 371, Title 18, U.S. Code.

In the Reviser's note to the 1948 enactment, reference is made to the "injustice of permitting a felony punishment on conviction for conspiracy to commit a misdemeanor." If any doubt exists as to whether Section 371 as presently constituted intended merely to change the *punishment* without also changing the grade of the offense, that doubt is promptly dispelled by Section 1, Title 18, U.S. Code. Section 1, in classifying offenses as a function of the penalty for violation thereof, makes that distinction firm, mandatory, and controlling of Section 371, Title 18, U.S. Code with the prefatory language:

"Notwithstanding any Act of Congress to the contrary . . ." (Section 1, Title 18, U. S. Code, Emphasis Added)

The reviewing court completely misapprehended the question we raised. That court thought our complaint went to the fact that the count alleged many diverse objects of the conspiracy. (Opinion, Appendix 68). But we do not question that the indictment could properly allege a thousand offenses as conspiratorial objects *so long as all were either felonies or misdemeanors.*

Taking the view that it did, the reviewing court answered our complaint with cases interpreting the *old* conspiracy statute (former Section 88, Title 18, U.S. Code). As the court observed, those cases held that a conspiracy is one "however diverse its objects," (Opinion, Appendix 68).

That generality was appropriate to the old law. It is not appropriate to the new, except where the alleged objects are of the same grade, for the very reason that the new law provides for different punishments depending on the conspiratorial objects and the old law did not so provide. The Court of Appeals dismissed our attempted distinction based on variant degrees of punishment as "irrelevant." (Opinion, Appendix 68). Yet that distinction provides the only structural difference between the old law and the new.

Petitioners maintain that they are entitled to the application of the conspiracy statute as presently constituted, not as it was constituted before 1948.

• • •

We believe there are urgent reasons for this Court's granting certiorari upon this point.

The point which we now raise is completely novel to this, or any other federal court.

The point has great importance and general applicability in view of the spiraling numbers of conspiracy prosecutions and the fact that it is a common practice in all federal jurisdictions to draft indictments with the final count charging a conspiracy to commit offenses alleged as substantive violations in previous counts. Where the previous counts are of mixed grade, *i.e.*, felonies and misdemeanors, we maintain that the conspiracy law as it has existed since 1948, requires a radical change in the drafting of those indictments.

In demonstration of the dangerous consequences of permitting the affirmance of the court below to stand, we submit that the following can occur, and will occur:

The government can charge a series of substantive misdemeanors for which it has proof, in the same indictment with one substantive felony for which it has no proof. It can further charge a conspiracy to commit the substantive offenses thus alleged. It can offer proof as to a conspiracy to commit the misdemeanors and no proof of any conspiracy to commit the felony. Upon the jury's verdict on the *general* conspiracy charge, the penalty appropriate to conspiracy to commit a felony can be imposed, without a breath of evidence as to any conspiracy to commit a felony.

Thus upon proof of a misdemeanor only, the way is open to impose a sentence of five years. As noted in the Reviser's notes, a primary purpose of the 1948 enactment was to rectify the injustice of imposing as severe a penalty upon conspiring to commit a misdemeanor as upon conspiring to commit a felony. Under the holding of the reviewing court here, the way is open to imposing a *more* severe penalty for the misdemeanor penalty than could have been imposed under the old law.

We ask this court to forestall these possibilities by granting Certiorari on this point that we may proceed fully to present this important point.

II.

The trial court erred in instructing the jury, and in failing to instruct, on a number of vital points.

> "Our theory of trial relies upon the ability of a jury to follow instructions." *Opper* v. *United States,* 348 U.S. 84.

A.

The defendants were deprived of the presumption of innocence.

The trial court charged the jury:

> "Now, as has been said here several times, this is a criminal case, and the law in such cases is that when defendants come into court presumed to be innocent that presumption protects them until such time, if such time shall come, when the jury shall believe from the evidence in the case, beyond any reasonable doubt, that the defendants, or any of them, are guilty as charged in the indictment or some count or counts of the indictment". (R. 574).

The Court of Appeals said:

> "*The instruction could have been made more clear.* An obvious effort was made by its draftsman to reconcile the instruction to two facts: First, that there were several defendants, and secondly, that there were several counts being tried. Both of these facts appeared to the jury from the trial proceedings as a whole and from various parts of the judge's charge." (Emphasis added). (Opinion, Appendix 72).

The trial court as well as the Court of Appeals recognized that something was wrong with the instruction. When the defects in the instruction were pointed out to the trial judge and his attention called to the fact that he

was depriving the defendants of their right to have the jury properly charged as to the presumption of innocence, he agreed that it was wrong, and said "Well, trust me to try to fix it up." (R. 576).

But, the court gave the instruction as objected to.

The Court of Appeals correctly observes that our objection to the instruction was:

> "that as soon as the presumption of innocence disappeared as to any defendant as to any count, then the presumption of innocence disappeared as to all defendants as to all remaining counts." (Opinion, Appendix 72).

The reviewing court then says:

> ". . . it is difficult to believe that a jury would interpret this instruction as meaning that the establishment of the guilt of any one defendant on any one count would *ipso facto* cause the presumption to disappear as to all the defendants on all remaining counts." (Opinion, Appendix 73).

But our so called "interpretation", *supra*, is in fact a paraphrase of the instruction given.

The instruction says that the presumption protects the defendants *"until such time"* when the jury believes that "the defendants, or *any of them*" are guilty as charged in the indictment or *"some count* or counts" thereof. Thus, under the plain meaning of the charge the presumption gave protection only until the jury found *"any of them"* guilty as to *"some count."* The force of the limitation would therefore be satisfied if the jury found "any of them" (*i.e.*, any *one*) guilty as to "some count" (*i.e., one* count).

In deciding that the jury "would not be so unreasonable" as to give the instruction its plain meaning, the Court of Appeals held that the jury's knowledge of law was such

that it ought to have known, notwithstanding the fact that "the instruction could have been made more clear", that the presumption of innocence in fact protected all defendants as to all counts until such time that each should be proven guilty beyond a reasonable doubt as to each count.

Thus the opinion below addressed itself not to the charge as given, but to the probability that a jury of laymen would be sufficiently sophisticated in the law to revise the charge as given, and apply the correct law.

This Court held in *Bollenbach* v. *United States,* 326 U.S. 607, 613, that a lay jury would not be required to pick its way through a maze of bad instructions in order to apply the good ones.

The jury in the instant case was required to reject the plain meaning of the instruction as given by the trial judge in order to arrive at a proper charge, never given by the trial judge.

This court has emphasized the importance of simon-pure presumption of innocence instructions in *Coffin* v. *United States,* 156 U.S. 432. Further, the Seventh Circuit is now in conflict with other Circuits. In *Miklencic* v. *United States,* 62 F. 2d 1044, 1045, the Third Circuit held that the importance of the presumption of innocence required that the instruction be given in its true substance, though the trial be otherwise faultless.

In *Dodson* v. *United States,* 23 F. 2d 401 the Court of Appeals for the Fourth Circuit, through Judge Parker, insisted that the presumption of innocence was so fundamental that it must not be minimized, and reversed accordingly.

The Court of Appeals here reversed as to a number of counts. As to some of those, there was not a wisp of evidence, *e.g.,* count 1. Is it not likely that the jury, having

found one defendant guilty of an offense charged in one count, the first, (which was reversed by the reviewing court), thereupon found itself unrestrained by the presumption of innocence so that it found the same defendant or his co-defendant guilty upon insufficient or doubtful evidence as to other counts? The dissenting judge observed that it could be "asserted with much certainty that the jury was in a highly confused state as to the two" petitioners. The confusion was abetted by the fact that the defendants went before the jury unprotected by the presumption of innocence.

B.

The Court refused a requested instruction to the Jury that the testimony of one accomplice could not corroborate the testimony of another accomplice (R. 595).

The U. S. Attorney agreed that the requested instruction stated the law (R. 595) but the instruction was refused anyway (R. 596).

The Court of Appeals held that the instruction was not applicable to any count in the indictment (Opinion, Appendix 72).

But, the testimony of accomplices was used to corroborate other accomplices by the Court of Appeals in its majority opinion. There, the testimony of accomplice witness Stern was used to corroborate accomplice witness Lazik as to the conviction on felony count 11. (Opinion Appendix 63). Similarly, the reviewing court in sustaining misdemeanor counts 4 and 5, where the petitioners were not identified, considered that other accomplices did identify the petitioners as to other counts (Opinion, Appendix 66). Is it not likely that the jury did so too, notwithstanding the complete absence of identification?

In *Hersch* v. *United States,* 9 Cir. 68 F. 2d 799, 807 (1934) the court held that where a correct proposition of law essential to a proper determination of the issues submitted to the jury is proposed by the defendant, and the law is not given in substance or effect, the court's refusal to give such charge constitutes error. By its opinion, the Seventh Circuit is placed in conflict with the Ninth. The instruction stated the law. *Arnold* v. *United States,* 10 Cir., 94 F. 2d, 499, 507. *Sykes* v. *United States,* 8 Cir., 204 F. 909. The trial court refused to give it.

C.

The weight to be given the confession was for the Jury to decide under proper instructions.

Following the charge the defense objected to the failure of the trial judge to instruct the jury:

> ". . . that the weight of any alleged confession, regardless of how it was obtained, is for the jury to determine". (R. 627)

The prosecutor thereupon advised the trial judge that he distinctly remembered:

> ". . . Your Honor told the jury that the weight of the confession was for the jury." (R. 627).

That instruction appears no place in the trial judge's charge (R. 602 to 618). It was not given. The prosecutor misinformed the court.

The requested instruction correctly stated the law.

Commonwealth v. *Dillon,* 4 U.S. 116; *Preston* v .*United States,* 80 F. 2d 702; *United States* v. *Ward,* 173 F. 2d 628; *Young* v. *United States,* 107 F. 2d 490; *Coletti* v. *United States,* 53 F. 2d 1017.

The Court of Appeals was silent as to our complaint on this point. We consider the matter to be of great importance because the jury was free to believe, in the absence

of such a proper instruction, that *since the trial judge had admitted the confession of Paul Echeles into evidence, the jury was bound to treat the contents thereof as absolute verities.* The jury should have been advised of its power, in the proper exercise of its duties, to give the confession such weight as it believed the confession warranted. The requested instructions would have served this purpose.

The Seventh Circuit is now in conflict with those Circuits which hold that the requested instruction is appropriate. (See cases cited above).

D.

The question of whether or not the confession of Paul Echeles was voluntarily made should have been sent to the jury under appropriate instructions.

The so-called confession of Paul Echeles was obtained after 8 hours of constant interrogation while he was held incommunicado (R. 333, 371, 467-8) The court admitted the confession over objection. Thereafter, it became the function of the jury to determine whether the confession were voluntarily obtained.

The trial judge was requested to instruct the jury:

> "The court instructs the jury that if it finds from the evidence that the written or oral statements attributed to the defendant, Paul Echeles, were extracted from him involuntarily, or by the use of threats, coercion, pressure or deceit in violation of his constitutional rights, then the jury may not consider the said statements, whether written or oral." (R. 596).

Another request made and refused was:

> "The jury is instructed that threats, pressure or coercion used in obtaining statements, whether written or oral, may consist in depriving a person of food and water or depriving him of his liberty or depriving him of his right to consult with counsel. If the jury find from the evidence that the statement of Paul

Echeles was so obtained, then it shall not consider such statement for any purpose." (R. 597).

The inspectors testified that Paul was interrogated for 8 hours (R. 333), that his telephone conversation with his wife was restricted and that the inspector would cut off the call if Paul said anything not to the inspector's liking (R. 371); that although Paul's office girl expected him back in his office at 4:30 P. M., the inspector admitted telling her in a telephone conversation that Paul most definitely would not be back. (R. 467-8). Even the reviewing court stated that:

> "... it became a question for the jury as to whether or not it was voluntarily given and, if so, it was for the jury to give it such weight as the jury thought it was entitled to receive" (Opinion, Appendix 59).

In a twist of logic unsupported by any legal citation and unsupported by any case of which we are aware, the reviewing court said that inasmuch as counsel could have argued this legal proposition to the jury, that it was not error to refuse to give what even the reviewing court admitted was a correct instruction. If such were the law of the land, then no case should ever be reversed for failure of the trial court to give a proper instruction because the counsel might have argued the legal proposition to the jury.

But without a guide from the presiding judge, how is the jury to treat any argument that is made?

The trial court did tell the jury that it must consider the instructions given as a "binding control" and that it must accept the law as given by the judge to guide them in their deliberations (R. 603).

The Court of Appeals for the Seventh Circuit has now announced a dangerous principle inimical to the proper administration of criminal justice when it has announced that because counsel might have argued a correct legal

proposition to the jury that the failure of the trial court so to instruct the jury properly when requested on a grave and important point is not error. The announced decision of the Seventh Circuit is in conflict with all known applicable rules of procedure in the trial of criminal causes. The rule as announced by the Seventh Circuit is in direct conflict with the rule as announced in the following cases:

Wilson v. *United States,* 162 U.S. 613;
Stein v. *People,* 346 U.S. 156;
Anderson v. *United States,* 318 U.S. 350;
Perrygo v. *United States,* 2 F. 2d 181;
Hall v. *United States,* 168 F. 2d 161;
Quong v. *United States,* 111 F. 2d 751;
Young v. *Territory of Hawaii,* 163 F. 2d 490;
Malaga v. *United States,* 57 F. 2d 822.

If the instructions requested were not technically correct, in the opinion of the trial judge, he was required to charge the jury properly on this important phase of the case. *Screws* v. *United States,* 325 U.S. 91, 107; *Tatum* v. *United States,* 190 F. 2d 612, 617.

E.

The Trial Court erroneously instructed the jury that although written statements of co-defendants Lewis and Paul Echeles may not be considered against the co-defendant, Julius Echeles, the limitation only applies to their written statements and not to their oral statements.

The trial court instructed the jury not to consider *any* statements made by Paul Echeles against Lewis (R. 616). The trial court further instructed the jury that "*No* statement of Max Lewis is in any way to be considered against the defendant Paul Echeles" (R. 616). But when the trial court came to limiting the statements, oral and written, of the defendants, Lewis and Paul Echeles, as against the defendant, Julius Echeles, the court charged the jury:

"The statements of Max Lewis and Paul Echeles are in no way to be considered as any evidence against the defendant, Julius L. Echeles. I am referring to their *written* statements which have been received in evidence" (R. 617). (Emphasis added.)

Exception was taken to the charge on the ground that the jury could not consider oral statements (R. 617)

Certainly the jury could be nothing but confused when the court instructed them differently as to Julius. As a matter of fact, the trial court had a greater obligation to protect the rights of Julius because he had asked for a severance before the trial on the ground that both co-defendants had made statements which would prejudice his rights to a fair trial (R. 14-15).

Even during the trial, there was a colloquy between the trial court and the counsel which could do nothing but have confused the jury as to how to treat the confessions of Julius' co-defendants. When the confession of Max Lewis was being introduced into evidence, Julius' lawyer asked the court to instruct the jury that Lewis' confession could not possibly be evidence against Julius and Paul Echeles (R. 316). The trial court stated "With the greatest of respect to you, I deny your request. Thank you for the suggestion" (R. 316). Thereupon the prosecuting attorney read the confession of Max Lewis to the jury without any limitation placed upon a consideration to be given by the jury (R. 316-318). When the prosecutor concluded his reading, he stated to the court as follows:

"If the court please, lest there be any misunderstanding, I am offering government's Exhibit 6 not for identification, only against the defendant, Max Lewis, and I am not offering it against the defendants Paul Echeles and Julius Echeles, insofar as this statement is concerned. (R. 318)

The court then said:

"You will permit me to adopt the suggestion of Mr. Stewart and instruct the jury to that fact?" (R. 318).

Thereupon the court instructed the jury that the statement which was just read by the prosecutor was to be considered only in the jury's treatment of defendant, Lewis "and not the other defendants" (R. 319).

We submit that the jury could only have been "in a highly confused state" as the dissenting judge in the opinion below put it (Opinion, Appendix 76).

The reviewing court decided that even though the instruction as given as to Julius was error that "no prejudice to Julius resulted therefrom" (Opinion, Appendix 75). It makes this conclusion from its assertions that we cannot point out where in the Record oral statements were made which mentioned Julius. It further rules that all Paul's oral statements to the inspectors were incorporated in his written statement. Such factual assertions by the reviewing court are not borne out by the Record. Lewis' oral statements appear in the Record at pp. 305-307. On pp. 320-326, there appear 6 pages of testimony regarding Paul Echeles' oral statements to Inspector Peterman. On pp. 345-347 and 351-377 of the Record there appears considerable testimony from Inspector Smith as to oral statements of Paul Echeles.

Highly prejudicial to Julius was the alleged oral statement of Paul Echeles as testified to by the two postal inspectors (R. 325 and 346) that the appointing official mentioned in Paul's written statement was John Haderlein, the postmaster. That oral statement is not in the written statement and was omitted in the written statement as the inspectors put it, because Paul did not want it in there (R. 365). We believe therefore that the Court of Appeals has misapplied the facts in the Record to excuse a clearly erroneous and damaging instruction to the jury as to Julius which is in and of itself sufficient grounds to reverse this case.

The trial judge thought that oral admissions of a co-defendant need not be limited to the person making them, and so stated in front of the jury. (R. 319-20)

Is it any wonder that the dissenting judge in the reviewing court stated that "it can be asserted with much certainty that it (the jury) was in a highly confused state . . ."? (Opinion, Appendix 76)

The following cases, amongst others, hold that statements of one defendant outside the presence of another cannot be used against the absent defendant: *Tresca* v. *United States,* 183 F. 736; *Fitzpatrick* v. *United States,* 178 U.S. 304; *Galatas* v. *United States,* 80 F. 2d 15; *Metcalf* v. *United States,* 195 F. 2d 213; *Bartlett* v. *United States,* 166 F. 2d 920; *United States* v. *Alfano,* 152 F. 2d 395; *Briggs* v. *United States,* 176 F. 2d 317.

In *Blumenthal* v. *United States,* 332 U.S. 539, at 552 this Court said the rulings of the trial court told the jury *plainly* to disregard the admissions of a co-defendant *entirely,* in every phase of the case. We ask for a review on the contrast between the instant case and the ones just cited.

Summation On The Erroneous Instructions.

This Court requires that a conviction in a conspiracy case be sustained only upon a Record free from substantial error and one in which proper instructions have been given on the vital issues in the case. *Krulewitch* v. *United States,* 336 U.S. 40. This court said in *Bihn* v. *United States,* 328 U.S. 633, 638, that:

> ". . . and in any event the probability of confusion in the minds of the jurors seemed so great, and the charge was so important to the vital issue in the case that we conclude that prejudicial error was committed."

In the above case this Court granted certiorari because the question was whether a portion of the charge constituted reversible error and because the charge given raised an important question in the administration of federal criminal laws. p. 635)

So also here are the questions important for this Court to review.

III.

The Trial Court abused its discretion in denying defendant, Julius Echeles, a separate trial.

Julius filed his motion and affidavit in support of said motion for severance before the trial (R. 14-15). In his affidavit he said he was informed that his co-defendants made statements to federal officers relating to transactions and that he feared that such statements, if introduced into evidence against such co-defendants, would prejudice his rights to a fair and impartial trial. The motion was denied.

On the morning of the trial during a colloquy in the judge's chambers the District Attorney stated to the court:

> "There may well be situations developing where there will be a genuine conflict of interest between those of Julius L. Echeles and Paul Echeles." (R. 76-77).

The Court of Appeals held that during this colloquy:

> "It is clear that neither he [Julius] nor any attorney representing Julius made any motion on that occasion for a severance". (Opinion, Appendix 52).

We respectfully point out that this statement by the majority below is incorrect. The fact is the motion for severance was then renewed by Julius' lawyer who stated at that time:

> "On that statement, you must remember that we moved for a severance for the lawyer defendant

> [Julius], and if the District Attorney is now disturbed, *we renew our motion,* then we will have something before this court to decide." (Record, top of p. 77).

Again at the bottom of p. 77 of the Record, Mr. Stewart advised the court as follows:

> "I told Mr. Cohen, when he mentioned it to me—he has prepared his case, and he has indicated to Your Honor that this is a case where the court should exercise its discretion in granting a severance. *That is the only motion that has been mentioned here this morning."*

At the close of the government's case, defendant, Julius renewed his motion for a severance (R. 401). The trial court stated as follows:

> "Actually we couldn't do it as a practical matter. If we were wrong in denying your motion for a severance in the first instance, we'll have to take the consequences. I don't see how you can move now for a separate trials of men who have been on trial for a week." (R. 402).

The failure of the trial court to grant a severance as to Julius was raised in the reviewing court which held as follows:

> "Defense counsel argues that the jury was confused when evidence was submitted against one defendant, in keeping in mind the exclusion of the defendants as to whom it was not admitted. The Record, on the other hand, indicates an intelligent understanding by the jury of the applicability of such evidence. For instance, the jury found the defendant, Lewis, not guilty, although it found the other defendants guilty."(Opinion, Appendix 53).

As to whether the jury intelligently applied the evidence as against each defendant, the reviewing court's own opinion belies its statement. The Court reversed the conviction of Paul Echeles as to three counts and reversed the conviction of Julius as to those same three counts, to-

gether with another count (Opinion, Appendix 75) —and reversed for a total failure of proof. But Lewis was only indicted in one count, the conspiracy count. Moreover, the instruction with respect to Paul's confession as to Lewis was correct as to Lewis (R. 616) and wholly incorrect and misleading as to Julius. (R. 617.) (See also argument in this Petition at pp. 22 to 25).

The dissenting judge was moved to expand his remarks to say:

> It appears to me that the defendant, Julius Echeles, was in all probability seriously prejudiced by statements of his co-defendants offered in evidence and the denial of the motion for a severance can hardly be excused on the basis that it was not appropriately presented by the defendants for the reason that both the court and the government's counsel had knowledge of the situation; in fact, the government's counsel were well aware of the harmful effect of the procedure employed, and they, as well as the court, had a duty to protect the defendants in their right to a fair trial. Admittedly the court had discretion in the matter but, to repeat a part of the quotation used by Judge Schnackenberg from *Dauer* v. *United States,* 189 F. 2d 343, 344: 'It is only when the situation is such that the exercise of common sense and sound judicial judgment should lead one to conclude that one defendant cannot have a fair trial, as that term is understood in law, that a severance should be granted.' That comment, in my opinion, is precisely the situation which existed as to the defendant, Julius Echeles." (Opinion, Appendix 75-6).

It is to be kept in mind that the instructions with respect to the oral and written statements of Julius' co-defendants were completely erroneous. Even the reviewing court's majority recognized the erroneous instruction but stated that no prejudice resulted to Julius therefrom (Opinion, Appendix 75). Such a finding is in contradiction to the applic-

able law of the land as laid down by this Court. *Krulewitch* v. *United States,* 336 U.S. 440; *Blumenthal* v. *United States,* 322 U.S. 539. In this court's recent case, *Opper* v. *United States,* 348 U.S. 84 the court stated:

> "That where there are *clear instructions and where the trial judge made clear and repeated admonitions to the jury at appropriate times* that one co-defendant's statements were not to be considered in establishing the guilt of the other co-defendant, then the trial court did not abuse its discretion."

Even though the Record in the case is 635 pages long, we respectfully and earnestly ask this court to review the Record at those instances specifically cited in this Petition with respect to the rulings of the trial court regarding the confessions and statements of Julius' co-defendants to determine whether this Record is free from error, or whether as the dissenting judge put it:

> ". . . I have a strong feeling that defendants did not have a fair trial . . . It appears to me that the defendant, Julius Echeles, was in all probability seriously prejudiced by statements of his co-defendants offered in evidence". (Opinion, Appendix 75).

IV.

The confession of Paul Echeles was illegally obtained. It was error for the Court to admit it.

Oral and written statements were taken from defendant, Paul Echeles by two postal inspectors after 8 hours constant interrogation (R. 333). He at first denied handling any money for several hours (R. 353). Later, he gave different answers to the inspectors and finally signed a written statement which did not incorporate all of his alleged oral admissions.

Paul was a postal clerk employed in the Chicago Postoffice and was called to the inspector's office on his day off.

He operated a small insurance office and had an appointment in his own office at 4:30 P. M. He arrived at the inspector's office at about 11:30 in the morning. During the questioning, one of the inspectors called Paul's office about 4:30 in the afternoon and said that he was calling for Paul. Paul's office girl told the inspector that Paul would be at the office at 4:30; that he was expected there. But the inspector told her that he did not think that Paul would be there. Much later in the interrogation at about 7:30 P.M. Paul asked if he could call his wife and the inspector "gave his permission"; but the inspector monitored the telephone call, kept his finger on the telephone button and threatened to cut him off if he told his wife that he was talking to the inspectors or if he said anything not to the inspector's liking (R. 371).

When Paul's wife was testifying she was asked by defense counsel what the telephone conversation was between her and Paul (R. 466). The inspector had already testified to his own version of the telephone conversation (R. 371). The trial court sustained a government objection and refused to permit Paul's wife to testify, notwithstanding that the defense counsel made an offer of proof that if she were permitted to testify she would contradict flatly the testimony of the postal inspector (R. 466).

It was further brought out that Paul received neither food nor drink during his interrogation (R. 333), that he was not advised of his constitutional rights, that he was under psychological threats and pressure of his job, he having been a postal employee for 28 years (R. 356). When the inspectors finished grilling him after 8 or 9 hours, they released him. Subsequently Paul was indicted.

The inspectors who arrested and detained Paul did not take him before a United States Commissioner, violat-

ing Rule 5, of the Federal Rules of Criminal Procedure which requires that an arrested person shall be taken without unnecessary delay before the nearest available commissioner. This is a novel means of evading Rule 5. It calls for this Court's review.

The question is can a person be detained against his will, grilled incessantly, a confession taken and then released—released because the officers desired to circumvent Rule 5. Had Paul been held over night and taken to the Commissioner the following morning, a square violation of Rule 5 would have occurred. Can this court then permit this unique procedure?

The reviewing court's opinion on this point is not in accord with the applicable decisions of this Court as announced in the cases of *McNabb* v. *United States,* 318 U.S. 332 and *Upshaw* v. *United States,* 335 U.S. 410.

The *McNabb* case stressed the illegality of unlawful detention and coercive effects of prolonged incommunicado questioning. To the same effect, *Anderson* v. *United States,* 318 U.S. 350.

In the *Upshaw* case this Court held:

> "A confession is inadmissible if made during illegal detention due to the failure promptly to carry a prisoner before a Committee Magistrate, whether or not the confession is the result of torture, physical or psychological" (p. 413).

We maintain that not only did the postal inspectors use a ruse to overcome the mandate of Rule 5, but that the confession was improperly coerced as it appears from the Record.

We ask this court to review on this point because the Court of Appeals' decision conflicts with the applicable cases of this Court, cited above.

V.

The petitioners were deprived of their right to compulsory process as guaranteed by the Sixth Amendment.

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . ." (United States Constitution, Amendment Six)

The Amendment applies to documentary evidence. *United States* v. *Burr*, 25 Fed. Cas. 30, 36; *Edwards* v. *United States*, 312 U.S. 473, 482; *Gordon* v. *United States*, 344 U.S. 414, 418; *Wilson* v. *United States*, 221 U.S. 361.

We sought to subpoena the records of all postal employees recommended for promotion during the tenure of postmaster Haderlein (R. 23-24). Our subpoena was quashed (R. 25, 82). Postal personnel officer Barritt testified to the invariability of promotions following the postmaster's recommendation (R. 86, 100, 101, 102). In its Opinion, the Court of Appeals held that the fact that Haderlein's recommendations were followed tended to establish part of the *corpus delicti* as to Count 11:

> ". . . there being no evidence that any such recommendation was not followed". (Appendix 63).

We anticipated the documents sought by this subpoena would prove that postmaster Haderlein's recommendations for promotions frequently were not followed.

The Court of Appeals, while thus admitting that it was material for us to demonstrate the inconclusiveness of Barritt's testimony, held that we were not entitled to the documents which would make that demonstration possible because their production would have been "unreasonable and oppressive" (Opinion, Appendix 55). In the trial court however production was denied on the prosecutor's assertion that the documents sought were immaterial. If, as the Court of Appeals admits by inference, the docu-

ments were material, the defendants should not have been denied access to them merely because they were voluminous.

Defendants cannot help it that matters material to their defense are space consuming. If documents are material, how can a request for their production be deemed unreasonable under Rule 17(c) Federal Rules of Criminal Procedure?

We also sought by subpoena in the trial court the production of the personnel jackets of named postal employees Lazik, Stern, Berman, Boese, Isom and Bonga, all of whom testified as accomplice witnesses against the petitioners (R. 20-21). The prosecutor claimed the files were immaterial (R. 82, 122); but government witness Barritt testified that note was made in those files of disciplinary action taken against the accomplices, which certainly would have or could have been material in their cross-examination for the purpose of impeachment.

The trial judge steadfastly denied production thereon *until five out of the six named accomplice witnesses had already given testimony and left the witness stand* (R. 275). By that time the documents in question were useless to the defense.

We had requested those documents repeatedly after the case was called for trial (R. 82, 121-124.) Production was finally required of the government by the court at R. 270, apparently on the ground that the files might contain impeaching documents. But this was after five of the six of the government accomplice witnesses to whom the documents related had left the stand.

In its opinion the Court of Appeals holds that the subpoena was not enforced at the request of the defense. Commencing at R. 123, following an extensive colloquy regard-

ing production under this subpoena, the following then took place:

> "The Court: Would you have me rule? Do you move to quash the subpoenas?
>
> Mr. Cohen [the prosecutor]: Yes, Your Honor, at this time.
>
> The Court: I will allow the government's motion unless you can show me the materiality, Mr. Oliver. Thus far, you have not.
>
> Mr. Stewart: Will your Honor reserve ruling on that . . .
>
> The Court: Yes, I offer to do that if your associate persists . . . *If he persists in having me rule, I will rule adversely to him. . . .*"

The Court of Appeals holds in its opinion (Appendix 55) that the above colloquy shows the desire of the defense that the judge not require production of the documents sought, but defer production.

The trial judge had threatened, were he to rule at all, to rule adversely to the defense. The only deferment sought was the deferment of an adverse ruling. Nothing said by the defense indicated any desire, save a desire for the production of the documents in question. Surely an important constitutional right cannot be held to have been waived by virtue of the defense request that the court not deprive the defendants of their right.

We sought production of the so-called political personnel files maintained by the postmaster during his tenure (R. 22-23). The subpoena was quashed (R. 26, 269) on the court's own motion.

The Court of Appeals in affirming Count 11 held that the fact that certain promotions were made tended to prove the elements of the offense charged, *viz*: an improper promise to postmaster Haderlein (Appendix 64).

We wanted to show with the documents sought, that the promotions proceeded from other considerations than im-

proper promises to the postmaster and that, therefore, the fact that promotions did in fact take place was not indicative of their having proceeded from unlawful promises.

The Court of Appeals has thus embraced both horns of a dilemma. If the fact of promotion indicates an improper promise, the Court of Appeals ought to have reversed on the ground that we were denied the means of showing that the promotions here proceeded from other motives. If the fact of promotion was not indicative of an improper promise, then the Court of Appeals ought not to have found support for Count 11 based on the view that the fact of promotion raised the inference of an improper promise.

The refusal of the trial court to enforce, the subpoenas issued deprived the defendants of their constitutional rights. The Court of Appeals in affirming the trial court places the Seventh Circuit in opposition to the established principles regarding compulsory process as announced by this and other courts.

The Second Circuit Rule is announced in *United States* v. *Andolschek*, 142 F. 2d 503, 507, *United States* v. *Grayson*, 166 F. 2d 863, 869-70 and *Krulewitch* v. *United States*, 145 F. 2d 76; in the District of Columbia Circuit in *Christoffel* v. *United States*, 200 F. 2d 734, 738; and in this court *Edwards* v. *United States*, 312 U.S. 473, 482 and in *Gordon* v. *United States*, 344 U.S. 414.

Here the constitutional infringement is clear. We have shown the specific reasons for the materiality of the documents. The total effect of the constitutional deprivation here amounted to a refusal to permit the petitioners to prove their defense.

VI.

Is a promotive office an appointive office or place as contemplated in Sec. 215, Title 18, United States Code? The precise question as raised in the Court of Appeals and as now raised here has never been decided by this Court.

A motion was made before the trial to quash the indictment on the ground that Congress did not contemplate the acts as alleged in the indictment to come within the purview of Sec. 215, Title 18, United States Code. Said Section states:

> "Whoever solicits or receives . . . money or thing of value in consideration of the promise of support or use of influence in obtaining for any person any *appointive office or place* in the United States shall be . . . " (Emphasis added).

The proof showed that all the jobs in question here were promotive jobs of people already in the postal services and that in most of the instances the individual already had the job but not the pay (R. 135, 180, 222).

Two questions are raised: first, is a promotive job an appointive office or place where the party promoted is already in the public service; second, whether or not the statute in question makes it a crime to obtain for another the pay to which he is entitled for the job which he is already performing. This Court said in *United States* v. *Weitzel*, 246 U.S. 533:

> "Statutes creating crimes are not to be extended by indictment because the court thinks the legislature should have been more comprehensive."

In *United States* v. *Harris*, 177, U.S. 305, this court stated:

> "It would be dangerous, indeed, to carry the principle that a case is within reason or mischief of a statute so far as to punish a crime not enumerated in the statute because it is of a kindred nature with

those which are enumerated. See also *U. S.* v. *Shapiro*, 113 F. 2d 891."

Appointment is different from promotion. Article 4, Chap. 2, Postoffice Manuel 1952. The following cases hold that promotions are different from appointments and that different rules apply to it: *Commonwealth ex rel Maurer* v. *O'Neill*, 368 Pa. 369, wherein the court said:

> "To interpret the word 'promotion' as synonymous with 'appointment' would be to ignore this mandate. Webster's New International Dictionary (2 Ed. 1943) defines promotion as the act of promoting, that is to advance from a given grade or class as qualified for one higher; an appointment has the distinction of a person to hold an office. Authorities too numerous to mention offer similar definitions and none proposes that the two terms are interchangeable" (374-5)

Similarly held in *McGuire* v. *Byrnes*, 2 N.Y.S. 760; *Rasmussen* v. *Board of Supervisors*, 25 N.Y.S. 2d 322; *McCarthy* v. *Director of Civil Service*, 319 Mass. 124; *McArdle* v. *Chicago*, 176 Ill. App. 142.

The reviewing court, in a short comment, held that appointive office includes promotive offices. (Opinion, Appendix 69). It did not cite any cases. There is no federal law precisely on this subject. The State cases above cited are in defendants' favor. We ask this Court to allow the Petition in order to determine this question for the first time. The holding of the Court of Appeals conflicts with the decisions of this Court which hold that the courts cannot extend a crime beyond the plain intendment of the legislature. *U. S.* v. *Weitzel*, 246 U.S. 533, and *U. S.* v. *Harris*, 177 U.S. 305.

VII.

The defendants were not identified as to several counts.

In Count 4, the defendants, Paul and Julius, were charged with receiving money from Morris Berman (R. 4). Berman testified that defendant, Lewis, sent him to Paul and

that Paul sent him to Julius and that he later went back to Paul (R. 234-51). Berman identified Lewis in the courtroom. (R. 234, 236). Berman did not identify either Paul or Julius. He was not asked to.

In Count 5, the witness Boese testified as to a solicitation (R. 253, 265). Boese identified Lewis (R. 254) and identified Paul (R. 255). He never identified Julius. He was not asked to.

The reviewing court held, without precedent, and without any citation of authority, that because the defendants were on trial for many days and because they were present in court and identified by numerous other witnesses (as to other counts) that there was nothing to these contentions. (Appendix, 66). This holding departs from the established requirements of proof in criminal cases. Therefore, this court should review the Court of Appeals' decision.

VIII.

The government failed to prove that any offense was committed as charged in Count 11 of the indictment.

In the Court of Appeals, petitioner Paul Echeles objected to his conviction under Count 11 on the ground that there was not sufficient proof of a *corpus delicti* of the crime *dehors* his supposed confession and oral admissions.

Petitioner Julius Echeles objected that there was absolutely no evidence which could sustain a conviction under this Count as to him.

Since Paul's admissions and confession should not be applicable to Julius, we set forth here separately, the evidence thought by the Court of Appeals to warrant Julius' conviction of the offense of making a promise to the postmaster, John Haderlein, in order to effect his decision in an official matter in violation of Sec. 201, Title 18, U.S. Code. (Appendix 79).

This court will subsequently observe that the same evidence is that which the Court of Appeals used to establish the *corpus delicti* as to petitioner, Paul, outside Paul's admission or confession. The following is from the Opinion, Appendix 63-4:

A. EVIDENCE AS TO PETITIONER, JULIUS ECHELES, AS TO COUNT 11.

1. Postmaster Haderlein's recommendations to promote employees were always followed by the Washington authorities.
2. Paul sent Lazik to Julius about a promotion and introduced him to Julius.
3. Paul left and Julius told Lazik that a promotion would cost $750.
4. Julius told Lazik he could make his arrangements with Paul.
5. Lazik paid Paul $750.
6. Julius asked Irving Fasman, who did not know Haderlein, to write Haderlein, the postmaster, a letter recommending Lazik's promotion.
7. Lazik was promoted.
8. In speaking to government witness Stern, about his promotion, Julius told him that he got only a small part of the money and the rest went to other parties, and that "it could be done through some north side politician" (without mentioning any name).

It is on the above evidence that the Court of Appeals has concluded that the jury could have found that Julius Echeles *made a promise to the postmaster, John Haderlein, to effect his decision in an official matter.*

From one end of the Record to the other, there is not one further word of testimony, applicable to Julius, from which any such promise can be wrung.

It nowhere appears in the Record that Julius knew, or had any relationship with the postmaster. The only evidence which could tie Julius in, was Paul's confession and

admissions. Those confessions and admissions must have been used by the Court of Appeals in sustaining this conviction as to Julius just as they must have been used by the jury, under the instructions of the court that the limitations upon Paul's extra-judicial utterances applied only to his written utterances.

The Court of Appeals distinguished the evidence in this count from count 12 (which was reversed) on the sole basis that as to this count, Julius asked another person to recommend Lazik's promotion to Haderlein. That letter appears at R. 302-303 and merely sets forth Lazik's qualifications. It makes no promises. It offers nothing. Yet the Court of Appeals says this is the criminal nexus between petitioner Julius, and postmaster, Haderlein.

We assume that the Court of Appeals, by its reference to a "north side politician", (Opinion, Appendix 63) thought the inference could be drawn that those words referred to postmaster Haderlein. Nothing in the Record provides grounds for drawing that inference. If money were promised to a "north side politician" and the proof failed to show that he was the official attempted to be corrupted as charged, the failure of proof would be total. That is exactly the situation here.

The Seventh Circuit is in direct conflict with the Eighth Circuit in its interpretation of the evidence set out above, Items 1-7. The court below interpreted the *fact* of Lazik's promotion as indicative of an improper promise to the postmaster. The Court of Appeals for the Eighth Circuit in *Vernon* v. *United States,* 141 Fed. 121, 126, said:

> "In the case at Bar, there is not a scintilla of direct evidence that there was any money being paid or promised to be paid by Vernon to Blanton. The fact that in all of these instances the sites recommended by the defendant were sleected is, no doubt, a strong circumstance to show that he had some influence with Blanton; *but in the absence of direct testimony that this influence was obtained by bribery,* the presump-

> tion of law is that it was exercised without the commission of a crime. The legal presumptions are all in favor of the innocence of the accused and of the dutiful and official action of Blanton." (Emphasis added.)

In this connection, we refer again to the fact that we expected to show, by the documents sought by our fourth subpoena discussed elsewhere herein, (this Petition p. 36) that the promotion of Lazik resulted from something other than a promise, or payment of money to postmaster Haderlein. But as we have elsewhere indicated (this Petition, pp. 34-7) we were denied compulsory process.

B. THE EVIDENCE, OUTSIDE PETITIONER PAUL'S CONFESSION AND ADMISSIONS, FAILED TO INDICATE THE EXISTENCE OF A *CORPUS DELICTI* OF THE OFFENSE CHARGED.

We are familiar with the recent holdings of this court in *Opper* v. *United States,* 348 U.S. 84; *Smith* v. *United States,* 348 U.S. 84. While we have no doubt that those decisions have eased the task of the government in showing the existence of the *corpus delicti* of an offense outside of any confession or admissions, we do not read them as destroying all necessity for such evidence. In *Smith* v. *United States, supra,* this court held:

> ". . . The corroborative evidence does not have to prove the offense beyond a reasonable doubt . . . as long as there is *substantial independent evidence that a crime has been committed* . . ." (Emphasis supplied)

The crime charged in count 11 *was an improper promise to postmaster Haderlein.* Outside the confession, there not only is no substantial evidence of a promise to John Haderlein, there is no evidence of any such promise. We refer Your Honors to items 1-7, set forth above in relation to the proof of Count 11 as to petitioner, Julius Echeles. This was the totality of proof as to a *promise* to postmaster Haderlein.

The Court of Appeals speaks of reasonable inferences from that testimony establishing a promise to postmaster Haderlein. (Opinion, Appendix 64). Yet there is not one word disclosed by those items, that any such promise was made. Even if it be assumed that the defendants sought Haderlein's help to secure Lazik's promotion, it cannot further be inferred that an improper promise was made to Haderlein in return therefor.

The evidence showed that other persons, politicians, preachers, lawyers, business men, and what have you sought to aid postal employees get promotions. (R. 135-167, 180-3, 220-22, 245, 258-60, 289-90). The Court of Appeals would establish therefrom that in each instance where such a request was followed by promotion the inference is raised thereby that the request included therewith a promise of a bribe.

As constituted, the opinion of the Court of Appeals herein is in direct conflict with the opinions of this Court in the *Opper* and *Smith* cases cited above.

IX.

The defendants were deprived of a fair trial because of the manifested prejudice of the trial judge against them. They were further deprived of a fair trial by the prejudicial misbehavior of the prosecutor.

The judge's prejudice against the defendants which contributed to their receiving an unfair trial, manifested itself in:

1. Abdication of the function of decision to the prosecutor, by open consultation with the latter upon matters submitted for ruling.

Instead of ruling forthwith on defense requests and objections, the trial judge frequently first asked for, then received, the prosecutor's view on matters submitted to

him. Not once in the trial was a similar request addressed to the defense. The court would also occasionally ask the prosecutor if he did not "concede" to defense demands, good on their face, instead of ruling for the defense as a matter of right.

Examples of the foregoing types of judicial prejudice occurred at Record, pages 82, 83, 108, 122, 126, 128, 130, 267, 318, 320, 335-336, 391, 446, 454.

We ask this Court to compare the peremptory manner with which the trial court ruled in the government's favor on government requests and objections.

We do not complain that the judge was in all instances wrong as he ultimately ruled. We complain that we were entitled to the ruling of the judge, rather than the ruling of the prosecutor transmitted through the judge.

2. The trial court curtailed unduly the examination and cross-examination of witnesses by the defense.

The pinnacle of the judge's curtailment of examination occurred when Belle Echeles, the wife of Paul, tried to testify (R. 466) to a conversation previously testified to by government witnesses (R. 334, 371). The purpose of her testimony was to show facts tending to prove the involuntariness of Paul Echeles' confession, and to contradict the government postal inspector witnesses. Notwithstanding our offer of proof as to the nature of the anticipated testimony, and the obvious materiality thereof, the door was slammed against us (R. 466). *Edwards* v. *United States*, 312 U.S. 473, reversed because of the refusal of an opportunity to the defense to adduce evidence.

Limitations on the right to cross-examine which prejudiced the defense occurred at Record 92, 94, 95, 100, 157,

161, 162, 163, 164, 167, 186, 187, 188, 195, 198, 203, 226, 228-9, 287, 288, 297, 311, 314, 375, 376, 562, 563.

It will be observed that the above examples relate largely to restrictions on cross-examination of government witnesses for the purpose of showing bias, interest, motive, complicity, and credibility. Those examples show that the objections to defense interrogation were sustained whenever it appeared that the credibility of a government witness was about to be assailed successfully.

We ask this court to grant Certiorari here insofar as the reviewing court has failed to follow the rules as laid down by this court in *Alford* v. *United States,* 282 U.S. 687, as regards the right of cross-examination, and this court's ruling in *Starr* v. *United States,* 153 U.S. 614, 622, as regards the prejudicial conduct of the judge.

3. The prosecutor tried to create inferences that certain things had taken place, which, if true, would have been highly detrimental to the defense. He did this by making statements in the form of question without thereafter offering proof though sometimes challenged to do so.

He asked a defense witness if that witness had not heard that Paul Echeles made incriminatory admissions subsequent to his alleged confession (R. 491). The implication was false, the prosecutor knew it, and offered no proof of such admissions. The prosecutor further tried to make it appear that a defense witness had failed to pass a "lie detector" test (R. 509-510). The defense demanded the results (R. 509) which were not forthcoming.

When the defense objected to the charge to the jury that the judge had failed to instruct that the weight of petitioner Paul's confession was for the jury (R. 627) the prosecutor misled the court by stating that he distinctly recalled that the instruction had been given (R. 627). The instruction had nowhere been given.

The Court of Appeals failed to apply the rule in *Berger* v. *United States,* 295 U.S. 78, 89 to the Record from the trial court. We ask this Court to grant Certiorari in order that we may present fully our complaint that the reviewing court has not followed the applicable rules adopted by this court.

• • • •

In reviewing our petition on the question of the prejudicial misconduct of court and prosecutor, we remind your Honors of the characterization, in the dissenting opinion below, of the whole trial.

Judge Major said:

> "I have a strong feeling that the defendants did not have a fair trial . . . The very nature of the case, considering the fact that there were three defendants and a multiplicity of charges, including that of conspiracy, in itself requires, in my view, that the judgment be affirmed only upon a Record free from substantial error. Unfortunately, however, we have no such Record . . ." (Appendix, 75)

On the basis of the examples and the Record page references set forth above, we urge upon this Court our view that the prejudicial behavior of judge and prosecutor provided the framework within which the trial proceeded. We submit that it was impossible for the jury to have given the petitioners fair consideration as required by due process of law.

CONCLUSION.

For the foregoing reasons this Petition for the Writ of Certiorari should be granted.

Respectfully sumitted,

FRANK W. OLIVER,
Attorney for Petitioners.

APPENDIX 1.

OPINION

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

April 20, 1955.

Before DUFFY, *Chief Judge*, MAJOR and SCHNACKENBERG, *Circuit Judges*.

SCHNACKENBERG, *Circuit Judge*. From judgments of conviction upon the verdicts of a jury, defendants, Julius L. Echeles ("Julius") and Paul Echeles ("Paul"), have appealed.

The indictment consisted of 13 counts. Eight of the first nine counts charged they received, and one count that they solicited, money in consideration for a promise of support and the use of influence in obtaining for the payers appointments to various positions in the post office, being misdemeanors in violation of 18 U. S. C. A. § 215. Counts 10 to 12 charge the defendants promised money to John Haderlein, postmaster of Chicago, to influence his decision in official matters, being felonies in violation of 18 U. S. C. A. § 201. Count 13 charges Paul and Julius and defendant, Max Lewis, with conspiracy to commit all the offenses set forth in counts 1 through 12 in violation of 18 U. S. C. A. § 371. The jury returned a verdict of not guilty as to Lewis on count 3 and found Paul and Julius guilty on all 13 counts.

1. Defendants in this court say that the court's prejudicial rulings and conduct deprived defendants of a fair trial according to due process of law.

(a) They say that the trial judge abdicated his judicial function to the prosecutor. In support of this contention they point to the following proceedings: (1) When, prior to the trial, defendants attempted to procure by *subpoena duces tecum* certain witness statements, the court struck from the subpoena reference to a statement by one

John Haderlein. Defendants now say, in doing so the judge reversed himself following a suggestion by Mr. Cohen, the government counsel. We find nothing in the proceedings on that occasion to sustain this charge. (2) Later government counsel moved to quash a subpoena procured by defendants and served upon the postmaster, claiming that it called for a huge mass of documents which obviously had no materiality. Defense counsel stated that they certainly should have the personnel jackets of the individuals named in the indictment. To this the court responded, "How about those Mr. Cohen?" The court did not merely suggest that the defense "consult with Mr. Cohen," as they now say in their brief. The court added to the suggestion, "Perhaps he can get for you what you really want. After all, you do not want him to bring a carload of personnel jackets in here." But defense counsel rejoined, "Yes, I do, your Honor." The court then sustained the motion to quash the subpoena. (3) At the trial, when Finn, attorney for defendant Lewis, stated an objection to certain government exhibits, the court asked Cohen if he cared to comment on that objection. The latter stated that he had no objection to their not being admissible against Lewis at that time. Whereupon the court told the jury that "We are going to receive these exhibits at this time only as to the defendants Paul Echeles and Julius L. Echeles. They are not to be considered as evidence against the defendant Max Lewis at this time. I will sustain your objection at this time so far as your client is concerned, Mr. Finn. I am sorry I didn't ask you to state your position." Mr. Stewart, attorney for Paul and Julius, said, "I had forgotten he is here, your Honor. I beg his pardon." (4) When the question of subpoenas came up again, the court observed that Mr. Cohen was to consider them overnight and inquired: "Did you consider them?" Receiving an affirmative answer, the court asked, "Would you care to state the Government's position with respect to these subpoenas?"

Thereupon followed a statement by Mr. Cohen of the government's objections to the production of the material asked for by the subpoenas.

Seventeen other colloquies, of a similar nature, are also cited to show abdication. This contention, given prominence by defendants as the first point argued in their brief in this court, is without basis in fact.

(b) Defendants urge that the court repeatedly and improperly limited their cross-examination. We have examined the incidents at the trial specifically relied upon by the defendants in this connection.

As we said in *United States* v. *Lawinski*, 195 F. 2d 1, at 7, where this court discussed the scope of cross-examination:

> "It is for the presiding judge to exercise a wise discretion in determining whether, considering the examination in chief, it is fit and proper that the questions presented be permitted or excluded. *Storm* v. *United States*, 94 U. S. 76, 24 L. Ed. 42. All the decisions agree that the latitude allowed should be great enough to subserve ends of justice; but once fixed by the trial court it can not be deemed erroneous except where it is clear that the discretion has been abused, even though the discretion is necessarily vague in extent."

We do not believe that the court abused its discretion in respect to the scope of cross-examination allowed defendants' counsel.

(c) It is argued that the trial judge embarked on a deliberate campaign of ridiculing trial counsel in the eyes of the jury. Typical of the examples cited are the following: When defense counsel Stewart was cross-examining the first government witness, the district attorney objected and the court sustained the objection saying: "Mr. Stewart, if there is some part of the case that makes it necessary for that information to go to the jury, there is a way of getting it in. We are restricted by the rules of evidence as to what you may inquire into on cross-examination." Mr. Stewart: "Am I to understand Your Honor is going to allow them to prove what they want to and I cannot ask

anything about these records?" Later, the court said to Mr. Stewart: "There is a way to prove anything material to your case, but that is not the right way, in my opinion." Again the court said to him: "If it is important to your case, then there is a way to get it in. We cannot do everything with one witness." The court also said: "I do request of you, Mr. Stewart, that you ask questions that are designed to impeach . . . just conform to the rules of evidence."

In view of the colloquy between court and counsel which appears to have accompanied these and other similar instances cited by defendants, we believe that the remarks of the court were not intended to, and did not, have the effect of ridiculing defense counsel.

A fair appraisement of the record fails to show that anything which the trial judge did or said deprived defendants of a fair trial.

2. Defendants also argue that the district attorney (Mr. Cohen) violated defendants' right to a fair trial because of his illegal and prejudicial conduct and questions during the trial. They point out that, the court having delegated its judicial function to the prosecution attorney, it was therefore error for the prosecutor to take advantage of that situation. We need not consider this argument in view of our holding that there was no such abdication.

We will, however, consider what defense counsel cites as the "highest peak" reached in the prejudicial conduct of the district attorney. He was cross-examining postmaster Haderlein, a defense witness. Without objection from defense counsel, Mr. Cohen asked: "For your information, Mr. Haderlein, the post office inspectors have testified that Paul Echeles told them, in addition to what is in the statement, that you were the person mentioned as the appointing official. Now, does that change your opinion of Paul Echeles?" The witness answered, "Either it would change my opinion of him or of the inspectors." Mr. Cohen then

asked that the answer be stricken as not responsive to the question. The court said: "It may go out, and the jury will disregard it."

Obviously, the question called for a yes or no answer and the answer was unresponsive. Inasmuch as no objection was made to the question, and the court properly struck the answer and told the jury to disregard it, we find that the incident involved no prejudicial conduct on the part of the prosecutor.

We similarly characterize the other instances of alleged misconduct.

3. Julius, before the trial, moved for a severance and supported his motion by his own affidavit, which set forth that he was informed that Lewis made a statement to the federal officers and also testified before the grand jury, that Paul made and signed a statement and Julius was informed that Paul "expects" to claim on the trial that the statement was involuntary. He also stated that he (Julius) was not present when the above statements were made and that "they are not admissible as evidence against him," having been informed that said statements purport to relate to transactions in which Julius had been mentioned. He also stated that he "fears and represents his belief that any such statement introduced in evidence as against said co-defendants in a joint trial would prejudice the rights of this affiant to a fair and impartial trial." The motion was denied.

While defense counsel admits that the granting of a severance rests within the discretion of the trial court, he maintains that in this case the court abused its discretion. He does not point out what showing was made by the affidavit accompanying the motion upon which such charge of abuse of discretion is based. Actually there is no allegation in the affidavit as to the contents of the statements signed by the co-defendants nor is there any allegation that

their defenses would be antagonistic to the defense of Julius.

Julius then shifts to a later occasion preceding the trial, when there was a discussion before the court as to who the attorneys for the various defendants were. It appearing that Mr. Finn would try the case for the defendant Lewis, and that Mr. Stewart and Mr. Oliver would represent both Paul and Julius, the district attorney stated that "There may well be situations developing where there will be a genuine conflict of interest between those of Julius L. Echeles and Paul Echeles." However, Mr. Stewart and Mr. Oliver, after a lengthy colloquy with the court and counsel, persisted in stating that they would represent both Paul and Julius. The court thereupon called these two defendants into chambers and stated what had just occurred. When Julius started to answer, Mr. Stewart silenced him. During the colloquy the court repeatedly asked Mr. Stewart if there was anything he would like to say or any comment he wished to make. Mr. Stewart asked whether it called for comment and added that he did not hear any motion. It is clear that neither he nor any attorney representing Julius made any motion on that occasion for a severance. The case thereafter went to trial as to all three defendants. Mr. Stewart and Mr. Oliver did try the case for both said defendants.

Inasmuch as Julius and Paul, and their lawyers, were advised of the possibility of conflict of interest between them at the trial and they nevertheless then chose to proceed with common counsel, one of whom still represents them in this court, and inasmuch as they made no motion for severance when this possible conflict of interest was called to their attention before the start of the trial, we do not believe that the charge of abuse of discretion by the trial court in this respect is supported by the record.

At the close of the government's case, Mr. Stewart re-

newed the motion for severance which was made originally and denied. It was denied.

In *Allen* v. *United States,* 202 F. 2d 329, where a motion by each of two defendants for a severance was made on the second day of the trial, although before any evidence had been introduced, on the ground that their defenses were inconsistent, without pointing out to the court where the inconsistency lay, it was held that a denial of the motion did not constitute an abuse of discretion. The court, at 334, quoted from *Dauer* v. *United States,* 189 F. 2d 343, at 344:

> "* * * The mere fact that there is hostility between defendants or that one may try to save himself at the expense of another is in itself alone not sufficient grounds to require separate trials. It is only when the situation is such that the exercise of common sense and sound judicial judgment should lead one to conclude that one defendant cannot have a fair trial, as that term is understood in law, that a severance should be granted."

Defense counsel argues that the jury was confused when evidence was submitted against one defendant, in keeping in mind the exclusion of the defendants as to whom it was not admitted. The record, on the other hand, indicates an intelligent understanding by the jury of the applicability of such evidence. For instance, the jury found the defendant Lewis not guilty, although it found the other defendants guilty. Moreover, it is highly significant that the record of the trial is devoid of any indication of antagonism between Julius and either of his co-defendants.

On the record before us we cannot say that error was committed by the trial court in originally denying Julius' motion for severance or in later denying the motion of the respective defendants for a severance.

4. Defendants contend that they were deprived of their constitutional right to compulsory process. They refer to the court's quashing of several *subpoenas duces tecum*

which would have required the government to produce for their inspection certain documents supposed to be in the government's possession. This contention is based upon the Sixth amendment to the Constitution of the United States which requires:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor. . . ."

and also upon rule 17(c) of the federal rules of criminal procedure, which provides:

> "*For Production of Documentary Evidence and of Objects.* A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. * * *"

(a) The first document sought was a statement by postmaster Haderlein. When the motion was argued, the district attorney told the court that Haderlein would not be called as a government witness. It may be that under rule 17(c) the subpoena process in available to a defendant to enable him to impeach a government witness by the use as evidence of a statement given by him to the government. *Bowman Dairy Co.* v. *United States,* 341 U. S. 214. However, that is academic in this case because Haderlein did not testify as a government witness. He did testify as a defense witness. Under these circumstances the defense could not have introduced the statement in evidence. It therefore had no evidentiary value to the defense and any effort made by the defendants to obtain the evidence by subpoena could not have been in good faith. *Bowman Dairy Co.* v. *United States, supra,* 219, 221. Rule 17(c) is a statutory method of implementation of the sixth amendment. Defendants not having brought themselves within the purview of rule 17(c), no error was committed by the district court in quashing the subpoena insofar as it pertained to Haderlein's statement.

(b) The second subpoena required production of the postal personnel jackets of all postal employees recommended for promotion during the tenure of Haderlein as postmaster, together with all documents and letters referred to therein or relating thereto. At the time the court quashed this subpoena, he stated, "After all, you do not want him (district attorney) to bring a carload of personnel jackets in here", to which defense counsel replied, "Yes, I do, your Honor." This remark indicates that the scope of the subpoena was unreasonable and oppressive within the meaning of rule 17(c), and the court did not abuse its discretion in quashing it.

(c) The third subpoena required production of the personnel jackets of the accomplice witnesses who testified against the defendants. When the defense moved for production of these documents, the court deferred ruling on the motion at the specific request of their chief counsel. Later in the trial, upon renewal of defendant's motion for production, the court permitted the subpoena to be filed and ordered the documents produced. Defendants are in no position to now urge as error the precise action of the court which defense counsel requested.

(d) The fourth subpoena required production of the "political personnel files" maintained by Haderlein during his tenure as postmaster, further identified by the names of six persons who testified for the government, and one Harold R. Noftz, deceased, who is named in the indictment as having paid money to influence his promotion. In the colloquy of counsel and court which preceded the quashing of this subpoena, the district attorney stated that the government had no "political personnel files", although there were personnel files of a confidential nature.

He contended that there was no showing as to the materiality of the documents sought. Defense counsel indicated to the court that the purpose of the subpoena was to reach

letters which men in public office might have written to the postmaster about the qualifications, or lack of qualifications, of aspirants for positions. We do not believe that such letters would be material in this case, because the indictment relates to payments of money and promises to make such payments, in consideration of promises of support and influence in obtaining such appointments. The existence of letters from public officials to the postmaster would have no tendency to prove or disprove such charges in the indictment. The quashing of the fourth subpoena was therefore not error.

5. On one occasion during the trial Mr. Stewart, who had been acting as chief counsel for Julius and Paul, was missing from the courtroom.

Thereupon Mr. Oliver, the other attorney for said defendants, stated to the court "We have run out of witnesses at this time" and asked for a short recess. The court asked him if he had no other witnesses in court ready to go ahead, and Mr. Oliver said that that was correct. The court asked how long it would take to get a witness, and Mr. Oliver stated that he did not know where Mr. Stewart was at that time or what he had in mind. The court stated that Mr. Stewart had not told him why he was leaving.

The court then asked Mr. Oliver several questions in regard to whether there was a witness in the courtroom who could testify. Mr. Oliver's answers were evasive. The court then denied a motion for an adjournment and told Mr. Oliver to put a witness on. Mr. Oliver stated "I'll see if I can find one *in the witness room*. There may be one or two there." On request, the court gave Mr. Oliver a few minutes adjournment for the purpose of telephoning Mr. Stewart.

The colloquy accompanying these proceedings is said by defense counsel to delineate the "intense prejudice of the judge and his intent to do the defendants harm."

The unexplained disappearance of chief defense counsel Stewart during the trial, without notice to or leave of the court, followed by the exasperating sparring of Mr. Oliver when the court attempted to find whether any witness was in court to testify, in our opinion, falls very short of showing prejudice on the part of the judge. Courts have repeatedly held that the granting of a continuance during a trial is purely a matter of discretion and not subject to review by upper courts, unless the discretion be abused. *United States* v. *Vrilium Products Co.*, 185 F. 2d 3, at 5; *United States* v. *Glasser* (7. Cir.) 116 F. 2d 690, 701; *United States* v. *Hartenfeld* (7. Cir.) 113 F. 2d 359, 362, cert. den. 311 U. S. 647; *U. S.* v. *Cook*, 184 F. 2d 642, 643.

We hold that the refusal to grant a continuance under the circumstances above outlined was not an abuse of discretion and does not constitute error.

6. The court, over objection, admitted into evidence a confession signed by Paul in an office in the main post office building in Chicago. The court, before doing so, heard only the testimony of a government witness, inspector Vernon K. Peterman, both on direct and cross examination. At that time the defense offered no evidence as to the admissibility of the document. While defense counsel indicated at that time that he might later make a motion to strike the document, he failed to do so. We hold that, on the evidence heard by the court, its admission of the confession in evidence was not erroneous.

Thereafter, before the court and jury, evidence was taken as to the confession. The facts most favorable to Paul, brought out thereby, we now state. To what extent the inferences favorable to Paul, deducible from these facts, were contradicted by other facts appearing in evidence, we need not now discuss.

Inspector Raphael A. Smith testified that Paul signed the confession in his presence, and that he participated in the questioning of Paul with inspector Peterman.

It is undisputed that Paul was a postal clerk and that he also had an insurance business conducted from an office of his own.

On the occasion in question Smith telephoned Paul at his insurance office, about noon on May 6, 1952, and asked him to come over. Paul got there about noon and he and inspector Peterman questioned Paul for about eight hours. Smith knew he was a postal clerk. Smith told him that they were investigating the manner of promotions in the post office. They talked about it and asked him questions. For a couple of hours he denied "handling money." Smith told him that they had "the information." He also told Paul that they held statements to that effect from various people. They confronted him with Max Lewis' statement involving Paul and said that they might have others.

During the questioning Smith called up Paul's office and talked to his office girl. This employee, Miriam T. Collins, testified that this call was near 4:30 o'clock. She said that Smith said he was calling for Paul. She told him that Paul was not there but that he would be in at 4:30. Smith said that he didn't think he (Paul) would be there. She said that she thought he would be because he had an appointment.

Paul asked Smith if he could call his wife, because she would be expecting him home and he didn't want her to worry about him—that she would have dinner ready. Smith consented but told Paul not to tell her he was talking to the inspectors—just to tell her he was at the post office and he would be late getting home. Smith did not want him to get into a long discussion about what he was doing. Thereupon Paul called his wife. She testified that it was then about 7:30 P.M. He talked to his wife, also his daughter. Smith had told Paul that if he did tell his wife any reason, Smith "would have to cut him off." According to Smith, Paul left them about 8 P.M. His wife testified that she did not hear from him between 7:30 in the evening when

the call came and 11 o'clock that night when she next saw him.

Inspector Peterman also testified in the presence of the jury as to the taking of the confession from Paul.

When Paul's wife was testifying his counsel asked her to detail the conversation she had with Paul when he called her on the telephone. The court sustained an objection to the question.

Paul's confession being in evidence, it became a question for the jury as to whether or not it was voluntarily given and, if so, it was for the jury to give it such weight as the jury thought it was entitled to receive. The voluntariness of the confession would have been a proper subject for argument by counsel before the jury. Whether or not defense counsel embraced that opportunity we do not know, because the record which they filed in this court fails to include the arguments of counsel for either side.

Paul's counsel requested the court to give the following instruction to the jury:

> "The jury is instructed that threats, pressure or coercion used in obtaining statements, whether written or oral, may consist in depriving a person of food and water, or depriving him of his liberty, or depriving him of his right to consult with counsel. If the jury find from the evidence that the statement of Paul Echeles was so obtained, then it shall not consider such statements for any purpose."

The court peremptorily refused to do so.

Whether it would have been error for the court to refuse this instruction if the evidence indicated that Paul was deprived of food and drink during the time he was in the inspectors' office, we are not called upon to decide. This is for the reason that evidence to that effect was adduced only in the absence of the jury and before the court, and was not by defendant's counsel re-introduced in the presence of the jury. Hence, the tendered instruction called the attention of the jury to evidence which was never heard by it. Its refusal was not error.

Also refused by the court was the following instruction tendered by the defense:

> "The Court instructs the jury that if it finds from the evidence that the written and oral statements attributed to the defendant Paul Echeles were extracted from him involuntarily or by the use of threats, coercion, pressure or deceit in violation of his constitutional rights then the jury may not consider the said statements whether written or oral."

For several obvious reasons the action of the court was not erroneous. The mere reference to Paul's "constitutional rights", without defining them for the jury, was not adequate for such an instruction. Moreover the vague use of the word "deceit" is not sufficient in view of the context of this instruction. The use of the word "involuntarily" with the subjunctive "or" and the words "by the use of threats, coercion, pressure or deceit" would be likely to mislead the jury.

The district court properly followed the course prescribed by law in reference to the proffered confession of Paul. In *Patterson* v. *U. S.*, 183 F. 2d 687, at 689, that course is indicated:

> "The general principles governing the admissibility of confessions are well established. The true test of admissibility in evidence is whether the confession was made freely, voluntarily and without compulsion or inducements of any sort. * * * This is a question relating to the admissibility of evidence and is not a question of fact for the jury, but on the contrary is the duty of the court alone to hear and decide upon the evidence offered. * * * And where the evidence is conflicting, as here, it is for the jury. * * * However, this does not mean that a jury shall pass on the admissibility of evidence, but merely that the jury may reject the evidence if it disagrees with the court's original determination that it was voluntarily made. * * * And the burden is on the prosecution to establish that the confession was not obtained by improper means. * * *"

The jury by its verdict indicated that the confession was not obtained by improper means.

7. Contending that a defendant may not be convicted upon his uncorroborated extra-judicial confession, defendants say that the government failed to present sufficient proof to corroborate the confession of Paul as to counts 1, 10, 11 and 12.

A conviction cannot rest upon a confession unless it is corroborated by evidence establishing the *corpus delicti*. To this effect, defendants' counsel cite *Forte* v. *U. S.*, 94 F. 2d 236, and the government cites *Manning* v. *U.S.*, 215 F. 2d 945.

Most American courts take the view that the phrase "*corpus delicti*" includes first, the fact of an injury or a loss and secondly, the fact of somebody's criminality (in contrast *e.g.* to accident) as the cause of the injury or loss. The proof of these two elements involves the commission of a crime by somebody. But the phrase "*corpus delicti*" does not include the fact of the connection of the accused with the crime—his identity as the criminal, or the guilty agent through whom the wrong has occurred. *Manning* v. *U.S.*, 215 F. 2d 945, at 947.

In the *Forte* case, *supra*, the court, in speaking of the corroborating evidence of the *corpus delicti*, said at 240:

> "We do not rule that such corroborating evidence must, independent of the confession, establish the *corpus delicti* beyond a reasonable doubt. It is sufficient, according to the authorities we follow, if, there being, independent of the confession, substantial evidence of the *corpus delicti* and the whole thereof, this evidence and the confession are together convincing beyond a reasonable doubt of the commission of the crime and of the defendant's connection therewith."

To the same effect, see *U. S.* v. *Angel*, 201 F. 2d 531, at 533.

The government attempts to meet the requirement for independent proof of the *corpus delicti* for the purpose of corroborating Paul's confession, by relying on his oral ad-

missions made to the postal inspectors at the time they were obtaining from him the written signed confession. There are at least two reasons why the government is in error. First, the oral statements which he made and which then and there were incorporated by the inspectors in the written confession, cannot for this purpose be considered separately from the confession itself, and hence they are no part of the proof of the *corpus delicti*. Secondly, the law is that oral admissions cannot be considered against a defendant, any more than his written confession can be, unless they too are supported by independent proof of the *corpus delicti*. In *Gulotta* v. *U.S.*, 113 F. 2d 683, it is said at 686:

> "Indeed, there is no sound reason why an uncorroborated voluntary admission of some element of crime should be given greater force as evidence of guilt than is accorded the accused's outright confession of the crime itself. * * * * No authority has been found holding that admissions may be given greater weight as evidence than may be given confessions, or that admissions may be received and considered as independent evidence corroborating a confession. * * * *"

Count 1 charges, in substance, that the defendants received $800 from Harold R. Noftz in consideration of a promise of support and the use of influence in obtaining an appointment for him in the post office. Up to the time the government rested its case in chief there was no proof corroborating Paul's confession in regard to Noftz. It was then that defense counsel moved the court for a directed verdict of acquittal. Hence the court erred in not directing a verdict as to count 1.

Neither was there, when said motion was made, any evidence in the record, independently of Paul's confession, that Paul or Julius promised to postmaster Haderlein payment of money with intent to influence the latter's decision in the matter of appointing Noftz to a position of clerk in charge of the post office at Chicago, as charged in count 10.

Hence it was error for the court to refuse to direct a verdict of acquittal as to said defendants on said count.

As to count 11, which was in substantially the same form as count 10, and related to the appointment of Morris Lazik to the position of general foreman in the post office at Chicago, there was evidence tending to prove the following facts:

Lazik was an employee in the post office where Haderlein was the appointing official and had authority to recommend to the post office in Washington promotions in the Chicago post office, there being no evidence that any such recommendation was not followed. About Christmas, 1951, at the post office where Paul was employed, he volunteered to help employee Lazik in securing a promotion and Paul told Lazik that to accomplish this result he would have to see his brother, Julius, whose office address he gave to Lazik. This Lazik did, being introduced to Julius by Paul. Paul having left the office, Julius told Lazik that the promotion would cost Lazik $750. Lazik asked if he could arrange payment with Paul, and Julius said any arrangement made with Paul would be satisfactory to him. Later the same month Lazik called on Paul in Paul's insurance office, paid Paul $400, signed a note for $350 and delivered it to Paul. In the previous month Julius had talked to Isadore Stern, another post office employee, after Paul had sent him to Julius about getting a promotion, at which time Julius said that such a promotion would cost $750. Julius said he "got only a small part of this money, the rest going to other parties", and that "it could be done through some north side politician" (without mentioning any name). Julius' language tended to indicate a customary method of handling such transactions.

At Julius' request Irving Fasman, his office associate, wrote a letter dated December 27, 1951, addressed to postmaster Haderlein, recommending Lazik for promotion to general foreman. Other than being introduced to Lazik

in the office about the time he wrote the letter, Fasman had no further contact with Lazik. He did not know Haderlein. Later Fasman's letter was found in Lazik's personnel folder in the file in the post office.

Lester M. Barritt was director of personnel at the Chicago post office at the time in question. The procedure there followed in connection with promotion of employees to supervisory jobs was the receipt by him of a memorandum from Haderlein authorizing Barritt to submit recommendations to Washington for promotions indicated in the memorandum, and then a form providing for the promotion was transmitted to Washington. Such a recommended promotion to general foreman was executed for Lazik and transmitted January 18, 1952, to become effective February 1, 1952. Lazik became general foreman on February 1, 1952.

This evidence, together with the reasonable inferences deducible therefrom, constituted independent proof of the *corpus delicti* under count 11, and therefore it was not error for the trial court to refuse to direct a verdict of not guilty on said count at the close of the government's case in chief.

As to count 12, which was in form similar to counts 10 and 11, except that it pertained to the appointment of Isadore Stern to the office and position of clerk in charge, it is true that there was evidence tending to prove the following facts: In the fall of 1951, Paul asked Stern if he would like to get a promotion; in November, 1951, Stern paid Julius $750 in Julius' office; on December 15th, 1951, he received notice that he would be promoted to clerk in charge, retroactive to December 1st; yet there is no evidence that a letter was written at Julius' direction, to Haderlein, as was done in the Lazik transaction, nor was any other contact shown between Julius and Haderlein in regard to Stern.

This means that there is no evidence, other than Paul's confession, from which a person could reasonably conclude, directly or by inference, that the defendants promised money to postmaster Haderlein with intent to influence his decision as charged in count 12. For that reason we hold the *corpus delicti* under count 12 was not proved by evidence independently of the confession. Hence, the trial court should have directed an acquittal at the close of the government's case in chief.

8. Defendants contend that the evidence is insufficient to sustain the verdicts on the misdemeanor counts, being 1 through 9.

It is unnecessary for us to make further reference to count 1.

As to count 2, we have heretofore, in connection with count 11, summarized the evidence (other than Paul's confession) tending to support the charge contained therein. Considering that confession against Paul but not against Julius, we hold that there is sufficient evidence in the record to support the jury's verdict as to both Paul and Julius under count 2.

As to count 3, we have heretofore, in connection with count 12, summarized the evidence (other than Paul's confession) tending to support the charge contained therein. Aside from that confession, we hold that there is sufficient evidence to support the jury's verdict as to both Paul and Julius under count 3. However, in connection with count 3, the defendants contend that, by their motion in arrest of judgment, they properly raised in the district court the point that the government had failed to prove venue as to count 3. The record shows, by the testimony of various witnesses as to that part of the transaction which occurred in the post office, that it is located in Chicago; and we will take judicial notice that Chicago is in the Northern District of Illinois. Part of the transaction referred to in count 3 took place in Julius' office. There is evidence

that this office was located on Washington Street in the city of Chicago. Venue was proved.

As to counts 4 and 5, the sole argument made by the defendants is that government witness Morris Berman, while testifying under count 4, was not asked to and did not physically point to the two Echeles defendants as a means of identification. In the questions put to him they were both referred to by name, and he testified to his dealings with them, covering the matters involved in count 4. It is also urged that when government witness Ervin Boese was testifying as to the matters involved in count 5 there was a similar lack of physical identification of Julius. The record shows that defendants were on trial for many days, and under the same names as referred to in the testimony of Berman and Boese they were present and identified by numerous other witnesses. There is nothing to these contentions.

We have examined the evidence pertaining to counts 6 and 7. As to count 6 we find that there is sufficient evidence as to both Paul and Julius to support the verdict of guilty.

As to count 7 we find no evidence to support the guilty verdict as to Julius, but ample evidence to support the verdict of guilty as to Paul.

As to counts 8 and 9, in arguing that the evidence is insufficient to support the verdicts, defense counsel point merely to evidence going to the credibility of several government witnesses. The credibility of witnesses and the weight to be given their testimony, are matters for consideration of the jury, with which the court will not interfere. We will not disturb the convictions as to these counts.

9. Defendants urge a total lack of evidence to sustain the convictions on counts 10, 11 and 12. We have already held that independent evidence of the *corpus delicti* as to count 11 was sufficient to corroborate Paul's confession of

guilt of the charge therein contained. Paul's participation in the crimes charged, and the details thereof, were set forth in this confession. We therefore conclude that the entire evidence pertaining to Paul was sufficient to sustain his conviction under count 11. We have heretofore set forth the facts appearing in evidence as to Morris Lazik's attempt to procure a promotion, aside from Paul's confession. This evidence is sufficient to sustain the conviction of Julius.

On the other hand, we have already held that independent evidence offered under counts 10 and 12 to prove the *corpus delicti* was insufficient to corroborate Paul's confession, and accordingly we now hold that the entire evidence pertaining to Paul was insufficient to support his conviction under those counts. Since Paul's confession was not admitted as against Julius and since, as heretofore stated, the other evidence was insufficient to prove the *corpus delicti* under counts 10 and 12, it is clear that Julius' conviction under those counts cannot stand.

10. Count 13 charges that Paul and Julius and Max Lewis did, from about July 1, 1951 to May 6, 1952, conspire to "commit offenses against the United States, to-wit: the offenses set forth and described in the preceding counts in this indictment" (which are incorporated in count 13 by reference). It further charges that, to effect the objects of the said conspiracy, and for the purpose of carrying it into execution, they performed the acts charged in the preceding counts of the indictment, and also certain specific acts.

Defendants argue that this is a charge that the defendants conspired to commit *all the several offenses* charged in the first twelve counts, the first nine counts charging *misdemeanors,* and counts 10 to 12 inclusive charging *felonies.* They state that no rule permits joinder of separate offenses in a single count. We fail to see the per-

tinency of the last statement. Count 13 charges a single offense—a conspiracy. The jury found Julius and Paul guilty on all of the thirteen counts. Count 13 is not duplicitous as contended by them. The variance in the degree of punishment permissible for misdemeanors as distinguished from felonies is irrelevant. They rely on *John Gund Brewing Co.* v. *United States,* 204 Fed. 17. However a later case, *Frohwerk* v. *United States,* 249 U.S. 204, at page 209 holds:

> "Countenance we believe has been given by some Courts to the notion that a single count in an indictment for conspiring to commit two offenses is bad for duplicity. This court has given it none. * * * The conspiracy is the crime, and that is one, however diverse its objects."

This conspiracy prosecution is brought pursuant to 18 U.S.C.A. § 371.[1]

In *Braverman* v. *United States,* 317 U. S. 49, at page 54, the court said:

> "The single agreement is the prohibited conspiracy, and however diverse its objects it violates but a single statute, § 37 of the Criminal Code. For such a violation, only the single penalty prescribed by the statute can be imposed."

Count 13 is not vulnerable to defendants' attack.

11. By their motion to quash the indictment, defendants say that they raised, and now raise, the question as to

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[1] It reads:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

whether a promotive office is an appointive office or place as contemplated in 18 U.S.C.A. § 215, which reads:

> "Whoever solicits or receives, either as a political contribution, or for personal emolument, any money or thing of value, in consideration of the promise of support or use of influence in obtaining for any person any appointive office or place under the United States, shall be fined not more than $1,000 or imprisoned not more than one year, or both."

The promotions involved in this case were made without examination. They were appointments of persons already in the postal service to offices or places more attractive than those held by them; they were therefore considered promotions. According to the established practice these promotions were made upon the recommendation of the postmaster at Chicago.

The phrase "appointive office" or "place" as contained in § 215 *supra* is, it seems to us, inclusive of the offices and positions to which promotions of various employees were made or sought, as referred to in the indictment and the evidence in this case. We so hold.

The district court therefore did not err in denying a motion to quash the indictment.

12. Defendants contend that the district court misled the jury with erroneous instructions and in refusing to give proper instructions:

(a) The jury was instructed:

> "Now, there has been some evidence introduced with reference to the reputation of the defendants in their own communities prior to their indictment. The circumstances may be such that an established reputation for good character may alone create a reasonable doubt, although without it the other evidence would be convincing.
>
> "You should take the evidence of good reputation into consideration in determining the guilt or innocence of the several defendants, but the mere fact that the defendants, or any of them, may have had a

> good reputation prior to his or their indictment should not be used by you as an excuse to acquit him or them in this case, if you believe, beyond a reasonable doubt, from all the evidence in the case, including the evidence of good reputation or good character, that he or they are guilty as charged in the indictment."

The defendants, in attacking this instruction, rely on *United States* v. *Semeniuk*, 193 F. 2d 508.

The instructions given in the two cases are not the same; they are significantly different. Here, the jury was told, in substance, that if, after they considered all of the evidence, including evidence of good character or good reputation, they believed beyond a reasonable doubt that the defendants were guilty, then they should not use good reputation as an excuse to acquit the defendants. In the *Semeniuk* case, the jury was told that the mere fact that a defendant may have had a good reputation prior to the time of the trial should not be used by the jury as an excuse to acquit him.

Moreover, in the case at bar, the jury was instructed (1) to take into consideration good character and reputation; (2) that evidence of good character "may alone create a reasonable doubt"; and (3) that if from all of the evidence, including evidence of good character and reputation, the jury believed the defendants guilty, then they should not use good character and reputation as an excuse to acquit. The giving of this instruction was not error.

(b) The court gave the following instruction:

> "If you believe that any witness who testified in this case actually took part in the commission of a crime, if in fact you believe from all the evidence that a crime or crimes were committed, then that witness is considered an accomplice and his testimony should be received with care and caution and scrutinized carefully. However, the mere fact that a witness may be an accomplice does not mean that he cannot tell the truth. It only means that you are to examine his

testimony with care, and if, having done so, you believe it is the truth, then you are to give it the same credence as the testimony of other witnesses."

Defendants say that the second part of this instruction negates entirely the first part, which they indicate is "half way proper". Inasmuch as this contention was not made before the trial court,[1] defendants are in no position to argue that point here. Furthermore the court followed the above quoted instruction with the following charge:

"The weight and credit to be given to the testimony of a person who has admitted his part in the commission of a crime, if any person had made such admission, and if in fact you do find that a crime has been committed and that the witness took part in its commission, is for you to decide."

We believe that these instructions, taken as a whole correctly state the law.

In their brief defendants say that "The court refused to give the instruction on accomplices requested by defendants * * *." However, in their brief they do not set forth this instruction or make any further reference to it in argument or otherwise. We therefore have not further considered that statement.

(c) The court refused to give the following instruction tendered by the defendants:

"The Court instructs the jury that the testimony of one accomplice witness can not be used to corroborate the testimony of another accomplice witness."

As to the first twelve counts each accomplice testified to an independent transaction covered by a separate count. There was no corroboration of such testimony by any *other accomplice.*

The similarity of the methods used by defendants in committing said alleged offenses, and their approximate chronological concurrence, were circumstances which, with

[1] 18 U. S. C. A. rule 30.

other evidence, tended to prove the conspiracy charged in count 13. No accomplice testified directly to the conspiracy offense itself and hence as to the existence or execution of the alleged conspiracy there is no occasion to consider their corroboration, by an accomplice or otherwise. In the structure of an orange each segment is a separate unit, and the peeling encompasses all of the units but is distinct therefrom. Conspiracy as a substantive offense, as charged in count 13, is distinct from the offenses charged in counts 1 to 12 inclusive, which were the objectives of the conspiracy. As we have seen, there was but a single offense charged in the conspiracy count.

For these reasons, this instruction was not applicable to any count in the indictment.

(d) Over defendants' objections, the court instructed the jury as follows:

> "Now, as has been said here several times, this is a criminal case, and the law in such cases is that the defendants come into court presumed to be innocent, and that presumption protects them until such time, if such time shall come, when the jury shall believe from the evidence in the case, beyond any reasonable doubt, that the defendants, or any of them, are guilty as charged in the indictment or some count or counts of the indictment."

Defendants argue that the jury was thus told "that as soon as the presumption of innocence disappeared as to any defendant as to any count, then the presumption of innocence disappeared as to all defendants as to all remaining counts." The instruction could have been made more clear. An obvious effort was made by its draftsman to reconcile the instruction to two facts: first, that there were several defendants, and secondly, that there were several counts being tried. Both of these facts appeared to the jury from the trial proceedings as a whole and from various parts of the judge's charge. Against that back-

ground, it is difficult to believe that a jury would interpret this instruction as meaning that the establishment of the guilt of any one defendant on any one count, would *ipso facto* cause the presumption of innocence to disappear as to all the defendants on all the remaining counts. We cannot believe that a jury would give such an unreasonable interpretation to the instruction. Under the circumstances of this case, there was no prejudicial error committed in this respect.

(e) The court refused the following instruction tendered by defendants:

> "The Court instructs the jury that it must consider the evidence as to each Count separately; and that before it can return a verdict of guilty as to each Count, the jury must be satisfied beyond a reasonable doubt that the Government has proved the allegations as set out in the Indictment in each and every Count."

The trial judge said that he would "cover that generally." The defense claims that he failed to do so, and that the omission was pointed out to the court.

The government contends, however, that in his charge the trial judge, in his own language, correctly instructed the jury on the same subject, as follows:

> "You have only one duty to perform, and that duty is to tell the Court whether or not the defendants, or any of them, are guilty or not guilty as charged under the several counts in the indictment."

The court instructed the jury in great detail as to which of various forms of verdict they should use, dealing separately as to *each* of the three defendants, and separately with respect to the *various* counts. For instance, as to each defendant *by name* he told the jury that, if it found that defendant guilty on some counts and not guilty on others, it should fill in the numbers of the counts in spaces provided in applicable forms of verdict, which were among those which he then delivered to the jury.

We fail to see how any juryman could have avoided knowing, after having heard these instructions, that it was his duty to consider each count separately in order to decide as to the form of verdict to be used. Actually this clear method of delineating the jury's duty as to each count separately was a more practical way of conveying the thought contained in the refused instruction, than the language of that instruction itself. The court's action in this respect was not erroneous.

(f) Defendants point out that in the course of his long charge to the jury the trial court said:

> "The statements of Max Lewis and Paul Echeles are in no way to be considered as any evidence against the defendant Julius L. Echeles.
>
> I am referring to their written statements which have been received in evidence."

They argue that an inference could be drawn by the jury that it could consider against Julius the oral statements of Lewis and Paul made outside his presence. However, whether there is any evidence to which this inference might be applied to the prejudice of Julius, requires our attention. In their brief defendants cite no oral statements of Lewis or Paul falling within the scope of the inference. On oral argument before us, when counsel for defendants was asked if he could point out any such oral statements, he was unable to do so. The defendants' reply brief refers to oral statements made by Lewis and Paul in which they say Julius was mentioned. However, the record shows that Lewis never mentioned Julius in any statement, oral or written. Paul's oral statements were obtained for the purpose of incorporating them into his written statement, were actually so incorporated, and are thus in evidence. The result is that the substance of the oral statements about which defendants now complain was really covered by that part of the charge which we have quoted. Therefore, under the circumstances of this

case, no prejudice to Julius resulted therefrom and there is no reversible error in that respect.

CONCLUSION.

For the reasons hereinbefore set forth, we hold that as to counts 1, 10 and 12, the judgments of the district court are reversed; as to counts 2, 3, 4, 5, 6, 8, 9, 11 and 13, the judgments of the district court are affirmed; and as to count 7 the judgment of the district court is affirmed as to Paul Echeles and the judgment of the district court is reversed as to Julius Echeles.

MAJOR, *C.J.*, dissenting. I am not unmindful of the exhaustive and careful review which Judge Schnackenberg has made in this case. However, I have a strong feeling that the defendants did not have a fair trial. No good purpose could be served in dissent in discussing my views in detail. The very nature of the case, considering the fact that there were three defendants and a multiplicity of charges, including that of conspiracy, in itself requires, in my view, that the judgment be affirmed only upon a record free from substantial error. Unfortunately, however, we have no such record. Perhaps it can be said that no single error was so prejudicial as to require reversal but, even so, there was an accumulation of errors sufficient to create gave doubt in my mind as to the fairness of the trial.

It appears to me that the defendant Julius Echeles was in all probability seriously prejudiced by statements of his co-defendants offered in evidence. And the denial of the motion for a severance can hardly be excused on the basis that it was not appropriately presented by the defendants for the reason that both the court and the government's counsel had knowledge of the situation; in fact, the government's counsel were well aware of the harmful effect of the procedure employed and they, as well as the court, had a duty to protect the defendants in their right to a fair trial. Admittedly the court had discretion in

the matter but, to repeat a part of the quotation used by Judge Schnackenberg from *Dauer* v. *United States,* 189 F. 2d 343, 344, "It is only when the situation is such that the exercise of common sense and sound judicial judgment should lead one to conclude that one defendant cannot have a fair trial, as that term is understood in law, that a severance should be granted." That, in my opinion, is precisely the situation which existed as to the defendant Julius Echeles.

The opinion points out the acquittal of the defendant Lewis (only charged in the conspiracy count) as an indication of the intelligent understanding by the jury. Perhaps the jury was not confused as to that defendant but it can be asserted with much certainty that it was in a highly confused state as to the two Echeles defendants. This is evidenced by the fact, as Judge Schnackenberg holds, that there was no competent proof in support of the charges contained in counts 1, 10 and 12, and no competent proof in support of the charge contained in count 7 as to the defendant Julius Echeles. Even so, the jury found these two defendants guilty on all counts, irrespective of proof or the lack thereof. This can fairly be attributed to the fact that the jury was unable to evaluate and properly apply the evidence as among the numerous charges and as among the different defendants. And it must be remembered that this confusing situation in which the jury was placed was the creation of the government and not that of the defendants or their attorneys.

I would reverse the judgment and remand the case for a new trial.

A true Copy:
Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX 2.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

Tuesday, May 10, 1955

It is ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby DENIED.

APPENDIX 3.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

Monday, May 16, 1955

On motion of counsel for the defendants-appellants, it is ordered that the issuance of the mandate of this Court in this cause be, and the same is hereby, stayed pursuant to the provisions of Rule 25 of the Rules of this Court.

APPENDIX 4.
Statutes and Rules Involved.

Fifth Amendment to the Constitution of the United States:

> "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life liberty or property without due process of law . . ."

Sixth Amendment:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . ."

Rule 5, Federal Rules of Criminal Procedure, Title 18, U.S. Code:

> "An officer making an arrest . . . without a warrant shall take the arrested person without unnecessary delay before the nearest available Commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States . . ."

Rule 8(a), F.R.C.P., Title 18, U.S. Code:

> "Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan."

Rule 17(c), F.R.C.P., Title 18, U.S. Code:

> "A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial

or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys."

Sec. 1, Title 18, U.S. Code:

"Notwithstanding any Act of Congress to the contrary:

(1) Any offense punishable by death of imprisonment for a term exceeding one year is a felony.

(2) Any other offense is a misdemeanor * * *"

Sec. 201, Title 18, U.S. Code:

"Whoever promises . . . money . . . to any officer . . . or person acting for and on behalf of the United States . . . in any official function . . . with intent to influence his decision or action on any question, matter, cause or proceeding which may at any time be pending . . . shall be fined not more than three times the amount of such money . . . or imprisoned not more than three years, or both."

Sec. 215, U.S. Code:

"Whoever solicits or receives, either as a political contribution, or for personal emolument, any money or thing of value, in consideration of the promise of support or use of influence in obtaining for any person any appointive office or place under the United States, shall be fined not more than $1,000 or imprisoned not more than one year or both."

Sec. 371, Title 18, U.S. Code:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States . . . each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 135

JULIUS L. ECHELES AND PAUL ECHELES,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The majority and dissenting opinions of the Court of Appeals (Pet. App. 47–76) are reported at 222 F. 2d 144.

JURISDICTION

The judgment of the Court of Appeals was entered on April 20, 1955, and a petition for rehearing was denied on May 10, 1955 (Pet. App. 77). The petition for a writ of certiorari was filed on June 9, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether an indictment charging a single conspiracy to commit both misdemeanors and felonies was duplicitous.

2. Whether promotions of postal employees are to an "appointive office or place" within the meaning of 18 U. S. C. 215.

3. Whether the trial court abused its discretion in denying a motion for a severance as to petitioner Julius Echeles.

4. Whether the confession of petitioner Paul Echeles was coerced and illegally obtained without taking him before a United States Commissioner in accordance with Rule 5, Federal Rules of Criminal Procedure.

5. Whether petitioners were deprived of the right to compulsory process by reason of the trial court's rulings on motions to subpoena certain post office records.

6. Whether the evidence was sufficient as to counts 4, 5, and 11.

7. Whether the court erred in its instructions.

8. Whether petitioners had a fair trial.

STATUTES AND RULES INVOLVED

18 U. S. C. 1 provides:

> Notwithstanding any Act of Congress to the contrary:
>
> (1) Any offense punishable by death or imprisonment for a term exceeding one year is a felony.

(2) Any other offense is a misdemeanor.

* * * * *

18 U. S. C. 201 provides:

> Whoever promises * * * money * * * to any officer * * * or person acting for and on behalf of the United States * * * in any official function * * * with intent to influence his decision or action on any question, matter, cause, or proceeding which may at any time be pending * * * shall be fined not more than three times the amount of such money * * * or imprisoned not more than three years, or both.

18 U. S. C. 215 provides:

> Whoever solicits or receives, either as a political contribution, or for personal emolument, any money * * * in consideration of the promise of support or use of influence in obtaining for any person any appointive office or place under the United States, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

* * * * *

18 U. S. C. 371 provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more

than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Rule 5 (a), F. R. Crim. P., provides:

> An officer making an arrest * * * without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith.

Rule 17 (c), F. R. Crim. P., provides:

> A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, docu-

ments or objects or portions thereof to be inspected by the parties and their attorneys.

STATEMENT

Eight of the first nine counts of an indictment returned in the United States District Court for the Northern District of Illinois charged that petitioners Julius Echeles and Paul Echeles (referred to as Julius and Paul) received money in consideration for a promise of support and the use of influence in obtaining for certain persons appointments to positions in the Chicago post office. Count 5 charged that they solicited money for that purpose. Such offenses are misdemeanors under 18 U. S. C. 215 (R. 2–5). Counts 10 through 12 charged them with promising money to John Haderlein, postmaster of Chicago, to influence his decision in official matters involving promotions of postal employees. These offenses are felonies under 18 U. S. C. 201 (R. 6–7). Count 13 charged petitioners Julius and Paul, and Max Lewis, with conspiracy to commit all the offenses in counts 1 through 12, in violation of 18 U. S. C. 371 (R. 7–8).

The jury acquitted Lewis, but found Julius and Paul guilty under all counts (R. 34, 35, 632). Identical sentences were imposed upon Julius and Paul for imprisonment for four months under counts 1 through 5 and for two months under counts 6 through 9, these sentences to run consecutively; for imprisonment for one year under

counts 10 through 13, these sentences to run concurrently with each other and with the sentences imposed under counts 1 through 9; and for fines of $250.00 on each of counts 1 through 5, $125.00 on each of counts 6 through 9, and $250.00 on each of counts 10 through 13 (R. 45, 47).

On appeal (R. 49, 51), the court reversed the convictions as to counts 1, 10 and 12; affirmed as to counts 2, 3, 4, 5, 6, 8, 9, 11 and 13; and affirmed as to count 7 regarding Paul, but reversed as to Julius (Pet. App. 75). Thus, Paul received a total sentence of twenty-four months and Julius of twenty-two months. The dissenting judge was of the opinion that a new trial should have been granted since petitioners Julius and Paul were not accorded a fair trial (Pet. App. 75–76).

1. Pertinent evidence adduced at the trial may be summarized as follows:

As to count 2, Lazik testified that, in December 1951, Paul introduced him to his brother Julius at the latter's law office to make arrangements for his promotion to general foreman at the post office. Julius told Lazik it would be satisfactory with him if Lazik made the $750.00 required payment to Paul (R. 215–217). Lazik paid Paul $400.00 in cash and gave him a promissory note for the $350.00 balance, which Lazik later paid. Lazik received the promised promotion on February 1, 1952 (R. 218–219, 88).

Regarding count 3, Stern testified that, upon the suggestion of Paul, in order to get a pro-

motion he went to Julius' office in November 1951 (R. 278–279). When Stern complained that the price of $750.00 was high, Julius explained, "Well, as far as I am concerned, I only get a small amount of it. The rest goes to other parties" (R. 280, 285). Julius announced that the promotion would be arranged "through some North side politician, not mentioning any names" (R. 281, 285). After Stern paid the $750.00, Julius said that no receipt would be issued but that he would hold the money in escrow. Stern received his promotion on December 1, 1951 (R. 282, 87).

As to count 4, Berman testified that Lewis introduced him to Paul as a man who could get him a promotion, and that Paul said he could arrange this through Julius (R. 235). Berman paid $850.00 to Julius in February 1952, but Paul later returned the money, explaining that the postal inspectors had told him to do this (R. 238–241).

Regarding count 5, Boese testified that at the suggestion of Lewis he saw Paul about a promotion, and Paul recommended him to Julius. In February 1952, Julius proposed an $850.00 price to Boese, but no payment was ever made (R. 254–258).

As to counts 6 and 7, Isom testified that in February 1952, at the suggestion of Lewis, he contacted Paul who sent him to Julius, to whom he paid $850.00 for a promotion (R. 171–175).

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In March, Paul informed Isom that they were not going ahead with the proposition and returned Isom's money (R. 176). In April 1952, Paul stated that he could proceed with the promotion, and Isom paid him $850.00 in Paul's office (R. 176–177). Later, Paul returned the money to Isom's wife (R. 179, 294–295).

In regard to counts 8 and 9, Bonga testified that at Paul's suggestion he went to see Julius about a promotion, and on January 7, 1952, paid Julius $800 (R. 126–131). In February, Paul returned the money, saying that the "heat was on" so that nothing could be done on the promotion (R. 132). Later, Paul informed Bonga that they could go ahead with the deal. Bonga went to Julius' office where he paid $500, with a promise to pay $300 later. On May 7, 1952, Paul returned the $500 to Bonga at his home, stating that he was "in a terrible jam, that somebody must have squealed" (R. 132–134).

As for count 11, in addition to the testimony of Lazik referred to above under count 2, there was testimony by attorney Fasman, an office associate of Julius, that at Julius' request he had written a letter dated December 27, 1951, to Postmaster Haderlein recommending Lazik for a promotion (R. 300–303). Lester Barritt, director of personnel in the Chicago post office, testified that when a promotion was to be made he would receive a memorandum from Haderlein authorizing him to submit a recommendation to the Post

Office Department in Washington. A standard form P. O. 50 formalizing the promotion was then prepared, as well as a letter transmitting to Washington this form over the signature of the postmaster. Barritt did not know of any cases where Haderlein's recommendation for promotion had been rejected (R. 84, 85–86). A form P. O. 50 for Lazik was approved in Washington, and he received his promotion on February 1, 1952 (R. 88). Haderlein testified that Paul had spoken to him on behalf of a promotion for Lazik (R. 483).[1]

2. Paul's written confession, which was received in evidence, was executed on May 6, 1952 (R. 335, 336–342). Paul was called to the office of postal inspectors Peterman and Smith on that date at about 11:30 a. m. and went voluntarily (R. 333). For the first few hours he denied handling money in arranging promotions of postal employees (R. 353), but after he had been told that Lewis and Noftz had given statements (R. 321), he made a written confession, which was carefully revised over a considerable period of time (see R. 325). This confession showed a

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[1] In Haderlein's testimony as a defense witness he denied any complicity in the crimes with Paul and Julius (R. 473–481). A part of Paul's written confession, *infra*, referred to the division of Lazik's $750 payment—$75 for Julius, $325 for Paul, and $350 for Haderlein [called the "Post office official" and "appointing official" in the confession] (R. 340). Paul's confession also contained various statements in support of counts 2 through 9 (R. 340–341).

course of dealing whereby he would send postal employees to Julius' office to pay for their promotions, so that he (Paul) would not be handling these matters in a conspicuous place such as the post office. Paul would arrange with Haderlein for the promotion, and the money would be divided between Paul, Julius, and the "appointing official" (R. 325–326).

The postal inspectors testified that no warrant had been issued for Paul's arrest and that he had not been arrested and was not taken before a United States Commissioner. If a person were to be arrested in one of their investigations, the inspectors would present the case to the United States Attorney, who would decide as to the necessity of a warrant (R. 329, 330, 348, 369). Before confessing, Paul was warned that he had a right either to make or not make a statement, but that if he did it could be used against him (R. 336, 369–370). Paul was in the inspectors' office from 11:30 a. m. until he left at 7:30 p. m., during which time he was not given any food, although one of the inspectors offered him food; a drinking fountain was available (R. 333, 334).

During the questioning, at about 4:30 p. m., inspector Smith phoned the girl at Paul's insurance office and told her that Paul would not be back that afternoon (R. 370, 468). Later, Smith permitted Paul to phone his wife to ask her not to wait dinner for him since he would be late. Smith instructed him not to tell her that he was

talking to postal inspectors because then he (Smith) would have to cut off the call. Smith said his purpose was to avoid getting in a long discussion with Paul's wife about the transactions involved (R. 370–371). The court sustained an objection on the ground of immateriality to offered testimony by Paul's wife as to the substance of this telephone conversation (R. 466–467).

3. Before trial, Julius moved for a severance, alleging that Lewis and Paul had made statements to federal officers in his absence; that they related to transactions in which Julius was mentioned; and that, if such statements were introduced in evidence in a joint trial, Julius' right to a fair and impartial trial would be prejudiced. The motion was denied (R. 14–16).

In a colloquy prior to the trial on February 8, 1954, attorneys Stewart and Oliver indicated they would represent both Paul and Julius. After United States Attorney Cohen stated that there might be situations involving a conflict of interests between Julius and Paul (R. 76–77), Stewart announced renewal of the motion for a severance (R. 77). However, shortly thereafter this renewal was apparently abandoned, for when the court asked Stewart for comments, he replied, "Does it call for comment? I didn't hear any motion," and the court stated, "No, there is no motion" (R. 77). The court called into chambers Paul and Julius, told them of the discussion as

to possible conflict of interests, and asked if they wanted to take any action to indicate what attorneys were to proceed on their behalf. Stewart stopped both of his clients from making a statement, and there was no renewal of a motion for severance (R. 78–80). At the close of the government's case the motion for severance was renewed and denied (R. 401–402).

ARGUMENT

1. There is no merit to petitioners' contention (Pet. 11–15) that count 13 was duplicitous as charging two grades of conspiracies to commit both misdemeanors (counts 1 through 9) and felonies (counts 10 through 12).

The Reviser's notes on 18 U. S. C. 371, as amended on June 25, 1948, provide:

> The punishment provision is completely rewritten to increase the penalty from 2 years to 5 years except where the object of the conspiracy is a misdemeanor. If the object is a misdemeanor, the maximum imprisonment for a conspiracy to commit that offense, under the revised section, cannot exceed 1 year.

This change in punishment does not change the basic rule that a single agreement to commit various offenses is a single conspiracy. *Braverman* v. *United States*, 317 U. S. 49, 54; *Ford* v. *United States*, 273 U. S. 593, 602; *Frohwerk* v. *United States*, 249 U. S. 204, 209–210. Here, there was but one basic conspiracy—a scheme to

receive money from postal employees and to bribe the postmaster to influence his decision in effecting their promotions. Both the misdemeanors and felonies were closely related features of the same general plan.

Conceivably, where both misdemeanors and felonies are charged as the object of the conspiracy, there could be an issue as to what punishment the court could impose. That issue is not present here since the imprisonment sentence under the conspiracy count was one year—within the permissible punishment for a misdemeanor.

2. Petitioners renew the contention, raised in motions to quash the indictment prior to trial (R. 9–12), that the promotions involved were not to an "appointive office or place" within the purview of 18 U. S. C. 215 (Pet. 36–37).

A well reasoned decision directly contrary to petitioners' position is *United States* v. *Jacobs*, 116 F. Supp. 928 (N. D. Ill.), construing this very statute. It holds that Congress intended the statute to be comprehensive in scope and was "attempting to outlaw all improper tampering with Government employment", whether by original induction or promotion of employees, and that the word "appointive" is broad enough to encompass "promotion". The comprehensiveness of the statute is further indicated by the Reviser's Note (1948 ed.):—"The term 'or place' was inserted after words 'appointive office' in order to give broader scope to the section and also to follow

the phraseology used in similar provisions of section 202 of title 18, U. S. C., 1940 ed., now section 216 of this title."

As this Court said in *United States* v. *Hood*, 343 U. S. 148, 151, in holding that an indictment under 18 U. S. C. 215 was improperly dismissed, where it alleged solicitation of contributions in return for promises to use influence to obtain offices not yet in existence but which the President had been authorized to create:

> We should not read such laws so as to put in what is not readily found there. But equally we should not read out what as a matter of ordinary English speech is in.

Without artificial or unduly liberal interpretation, the statute here is clearly susceptible of the construction given it by both courts below.

3. There is no merit in the contention (Pet. 26–29) that the trial court abused its discretion in denying the motion for a severance. See the Statement, *supra*, pp. 11–12. Even assuming there was a renewal of the motion for severance (but see pp. 11, 12, *supra*), there was no showing of a conflict of interests. The fact that attorneys Stewart and Oliver did proceed to represent both Paul and Julius, after warning as to possibility of conflict, indicates that they and their clients did not believe such conflict existed. And as the court below observed, "it is highly significant that the record of the trial is devoid of any indication of antagonism between Julius and either of his co-

defendants" (Pet. App. 53). Thus, the only basis for asking a severance was that Paul had mentioned Julius in his confession. That alone does not require a severance. *Opper* v. *United States,* 348 U. S. 84, 95; *Allen* v. *United States,* 202 F. 2d 329, 334 (C. A. D. C.), certiorari denied, 344 U. S. 869; *Dauer* v. *United States,* 189 F. 2d 343, 344 (C. A. 10), certiorari denied, 342 U. S. 898; *United States* v. *Harris,* 211 F. 2d 656, 659 (C. A. 7), certiorari denied, 348 U. S. 822. It must be presumed that a jury will follow the court's instructions to disregard admissions by one defendant as evidence against the other. *Opper* v. *United States, supra.*

4. Petitioners also contend that Paul's confession (see the Statement, *supra,* pp. 9–11) was both coerced and illegal in that Paul was not taken before a commissioner, as would have been required if he had been arrested (Pet. 29–31). There is, however, nothing in the record to show that Paul was compelled to go to the office of the inspectors. He went voluntarily, and remained voluntarily to answer questions in the legitimate investigation which the inspectors were conducting as to misconduct in the Post Office Department. He was offered food, and a drinking fountain was available (R. 333, 334). He was advised that he was not required to make a statement but that, if he did, it could be used against him (R. 336, 369–370). The fact that he had been a clerk in the Post Office for twenty-eight

years (R. 356) does not represent psychological pressure by the inspector (see Pet. 30), but rather indicates why Paul would consider the investigation an appropriate one with which he should cooperate. Nor is it demonstrated how the incidents of the telephone calls to Paul's secretary and to his wife were relevant on the question of the alleged coercion of his confession. A major part of Paul's 8-hour session with the inspectors was spent in making changes so that the confession would be precisely as he wanted it (R. 325). The totality of circumstances negates any coercion in obtaining the confession.

The record shows that no warrant had been obtained for Paul's arrest when he was questioned by the inspectors, and that he had not been arrested (R. 329, 330, 369).[2] At the conclusion of the interrogation, he left the office and went home (R. 333, 467). Since he was not arrested, there was no occasion to arraign him in accordance with Rule 5, F. R. Crim. P. Cf. *Jenkins* v. *United States,* 161 F. 2d 99, 101 (C. A. 10).

5. Petitioners sought to subpoena all letters or memoranda written by Postmaster Haderlein during his tenure of office (1948–1952, R. 85) recommending employees for promotion, and the personnel files of all employees of the Chicago

[2] There was evidence that, if an arrest were deemed necessary, postal inspectors were required to consult a United States Attorney for decision as to whether they should obtain a warrant of arrest (R. 348).

Post Office recommended for promotion during that period (R. 23–24), as well as the political personnel files of the employees who testified as witnesses for the government (R. 22). When the matter came on for hearing, the United States Attorney stated that, as to the personnel jackets of the individuals named in the indictment, he would have them in court and, if there was any showing made of their materiality they would be available, but as yet materiality had not been shown (R. 82). As to the subpoena directing production of all records regarding employees recommended for promotion, the court suggested that counsel for petitioners consult with the United States who could perhaps get what counsel really wanted. The judge said "After all, you do not want him to bring a carload of personnel jackets in here." (R. 83).[3] When counsel replied that he did, the court said, "Modify the present subpoena to quash, and I will respect your motion" (R. 83).

The next day, after the Director of Personnel of the Chicago Post Office had testified that he knew of no case in which Mr. Haderlein's recommendation had been rejected (R. 86), petitioners' counsel renewed their requests for the various documents sought in the subpoena (R. 121). The United States Attorney offered voluntarily to

[3] The evidence showed that there were between 19,000 and 21,000 employees in the Chicago post office, and about 450 promotions to supervisory grades in the period in question (R. 86).

turn over documents if their materiality were shown. After discussion, the court stated that it was not persuaded of materiality at that time (R. 122–123). When the judge said "I will allow the Government's motion unless you can show me the materiality," co-counsel requested a reservation of the ruling, stating "I think we can probably show it as we go along" (R. 124). In this connection, the court said, with respect to younger counsel, "If he persists in having me rule, I will rule adversely to him" (R. 124). At the end of the discussion, however, the court ruled (R. 125), "Your associate, Mr. Stewart, asks that I defer my ruling, and I do defer it" (R. 125).

Later in the trial, a subpoena was served requesting the personnel jackets and political files of the witnesses who had testified for the government. Defense counsel also requested answers to charges filed by the witnesses and these were turned over by the government (R. 265–266). The court ruled that the political personnel file was immaterial (R. 268–269), but that the personnel jackets might have impeaching value and should be produced (R. 270–271). Petitioners attack all aspects of the court's rulings on the subpoenas (Pet. 32–35).

a. Leaving aside the issue of whether petitioner's counsel substantially abandoned his request by asking the court to defer its ruling, it is clear that petitioners were not entitled to all the personnel files of *all* the employees who were

recommended for promotion. Whether or not others received promotions with or without the payment of money would not tend to show that the petitioners had not received or solicited money for recommending the promotions in question. To require the production of all personnel files of all employees recommended for promotion would clearly have been "unreasonable" and "oppressive" within the meaning of Rule 17 (c).[4]

b. The political files were also immaterial. The fact that some other person recommended the particular witness would have no real bearing on the issue of whether petitioners received money for arranging the promotion. Reception of evidence along this line would have involved lengthy and detailed deviation on a collateral issue.[5]

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[4] Cited decisions of this Court involve different situations and are not apposite (Pet. 35). In *Edwards* v. *United States*, 312 U. S. 473, 481–482, the transcript sought was material and the very foundation of a plea in bar. And in *Gordon* v. *United States*, 344 U. S. 414, 418–419, the prosecution witness' statement in possession of the government was contradictory of his trial testimony, and that contradiction was as to material matters bearing on the question of the accused's participation in the crime.

[5] In discussing the evidence corroborating Paul's confession that he paid money to Haderlein for the promotion of Lazik (count 11), the court mentions the fact that Lazik's promotion followed the payment of money (Pet. App. 63–64). Petitioners argue that this shows that it was material to show that promotions could follow from considerations other than improper promises (Pet. 34–35). The fact of promotion was, however, only one of the circumstances noted by the court. It was not, in and of itself, deemed corroborative of the confession.

c. As to the personnel folders of the government witnesses, the court did order them produced. Petitioners argue (Pet. 33) that the ruling came too late, because five of the government witnesses had already testified. There was, however, ample time to recall the witnesses for further cross-examination if defense counsel had deemed this course advisable. That they did not do so suggests that they did not find anything impeaching in the files.

6. a. Petitioners argue that the evidence on counts 4 and 5 was insufficient in that, as to count 4, Berman did not identify either Paul or Julius by pointing to them, and, as to count 5, Boese did not so identify Julius (Pet. 37–38). Paul and Julius identified themselves as defendants at the arraignment and at commencement of the trial (R. 79–81). Cf. *United States* v. *Fujii,* 55 F. Supp. 928, 930 (D. Wyo.), affirmed, 148 F. 2d 298 (C. A. 10), certiorari denied, 325 U. S. 868; *Ryan* v. *United States*, 99 F. 2d 864, 870 (C. A. 8), certiorari denied, 306 U. S. 635. Paul and Julius were continuously present with counsel during the long trial, and other witnesses did point them out as being Paul and Julius Echeles (R. 125, 128, 172, 174, 214–215, 217, 278, 279). There was, moreover, no attempt on cross-examination to show that Berman was unable to identify Paul and Julius, or that Boese was unable to identify Julius. In these circumstances, it is plain that there was no insufficiency of proof as to the iden-

tity of Paul and Julius under the challenged counts.

b. Petitioners also argue (Pet. 38–42) that the evidence was insufficient to sustain their convictions under count 11, a felony count, on the ground that the evidence as to Julius was indirect, and as to Paul that the independent evidence did not corroborate the corpus delicti. Since the one year sentence on that count runs concurrently with the sentence on the conspiracy count (count 13) and with the accumulated sentences on the various misdemeanor counts, the contentions affect only the $250 fine on such count.

As to Julius, it is true there was no direct evidence that he made an express promise of money to Haderlein to influence his decision on postal promotions. Paul, however, had received from Lazik the regular fee, the amount of which had been named by Julius, who had stated at a previous time that promotions were arranged through a "North side politician." Julius worked closely with Paul throughout the transaction. Julius also arranged for the contemporaneous writing of the Fasman letter to Haderlein, after which Lazik's promotion ensued. Thus, there was ample evidence to justify the inference that he was party to a scheme to pay money for promotions.

By the same token, the independent evidence, aside from Paul's confession, was sufficient corroboration thereof. Evidence independent of the confession showed that Paul volunteered to help

Lazik to secure a promotion and sent him to Julius for that purpose. The agreed price was paid to Paul, and Lazik's promotion followed. All of this evidence "fortifies the truth of the confession" and lends the required trustworthiness to it. See *Opper* v. *United States*, 348 U. S. 84, 91; *Smith* v. *United States*, 348 U. S. 147, 156.

7. Petitioners attack the judge's instructions on a number of grounds (Pet. 15–26).

a. They argue (Pet. 15–18) that the instruction on the presumption of innocence[*] permitted the jury, if it thought the defendants guilty on any one count, to believe that the presumption would disappear on the remaining counts. Aside from the fact that objection was not made as required by Rule 30, this implication is unwarranted, as the court below held (Pet. App. 72–73). The jurors were explicitly informed as to the nature of the various counts (R. 607–611) and the possibility of finding the individual defendants guilty or not guilty under them (R. 618). On the conspiracy count, the court specifically charged that the "law presumes [the defendants] innocent of the offense of conspiracy" (R. 615). Previously, the court had

[*] "Now, as has been said here several times, this is a criminal case, and the law in such cases is that the defendants come into court presumed to be innocent, and that presumption protects them until such time, if such time shall come, when the jury shall believe from the evidence in the case, beyond any reasonable doubt, that the defendants, or any of them, are guilty as charged in the indictment or some count or counts of the indictment."

charged that "you cannot find any of these defendants guilty unless, from all the evidence, you believe him guilty of the offense or offenses charged in this indictment, beyond a reasonable doubt" (R. 604). When the charge is construed as a whole, as it must be (cf. *Boyd* v. *United States,* 271 U. S. 104, 107), it is clear that it would not mislead a reasonable jury.

b. The trial court (Pet. 18–19) refused to give the following instruction (R. 595, 623):

> The Court instructs the jury that the testimony of one accomplice witness cannot be used to corroborate the testimny of another accomplice witness.

This request did not even embody petitioners' point (R. 595) which was that, in view of the conspiracy count, the jury might feel that the accomplice witnesses corroborated each other because of the similarity of the acts charged. This colloquy then ensued (R. 595):

> The COURT. Regardless of what the jury says, which accomplice witness's testimony tends to corroborate the testimony of another accomplice witness. I am just asking you. Instructions have to be based on the evidence.
>
> Mr. OLIVER. Let me say, when you ask this question, when you ask me what accomplice corroborates another accomplice, then I have to say no accomplice corroborates another accomplice. * * *

Thus, petitioners' counsel admitted what is obvious from the record, *viz*, that the accomplice payers of the bribes testified as to the crimes under the particular counts involving them, and did not in any real sense corroborate each other's testimony. There was therefore no necessity to give an instruction of the type sought, even if it had been more aptly phrased.

c. Petitioners object to the court's failure to instruct that the "weight of any alleged confession, regardless of how it was obtained, is for the jury to determine" (R. 627; Pet. 19–20). But even though this exact language was not employed, the charge when read as a whole shows that the question as to the weight to be given Paul's confession was for the jury to decide. The court charged that the jury could find the defendants guilty only after consideration of "all the evidence", this phrase being repeated several times (R. 604). There was also the charge that the "jury has a right to weigh and examine the evidence closely and * * * to take into consideration the common knowledge and experience of mankind in determining whether the evidence is reasonable or unreasonable, or probable or improbable, and in determining what weight it is entitled to receive" (R. 607). It is not necessary to repeat an instruction already given in different language. *Agnew* v. *United States,* 165 U. S. 36; *Holt* v. *United States,* 218 U. S. 245, 253. Nothing in the charge tends to indicate that the jurors were

bound to treat the contents of Paul's confession as absolute verities.

d. It is asserted that the trial court erred in refusing to give two instructions as to the alleged involuntary nature of Paul's confession[7] (Pet. 20–22). However, when the confession was offered in evidence through the testimony of a post-office inspector, one of petitioner's counsel stated that he had no intention of cross-examining the witness but would put Paul on the stand to testify as to his experiences (R. 327). Later, at the request of co-counsel, there was a hearing outside the presence of the jury (R. 327), and the inspector was questioned about the circumstances of the confession (R. 329–335). When the jury was recalled, the statement was put in evidence (R. 336–342), but the witness was not cross-examined (R. 342). Another inspector, who was present at the time Paul was questioned, was

[7] "The Court instructs the jury that if it finds from the evidence that the written and oral statements attributed to the defendant Paul Echeles were extracted from him involuntarily or by the use of threats, coercion, pressure or deceit in violation of his constitutional rights then the jury may not consider the said statements whether written or oral" (R. 596, 624).

"The jury is instructed that threats, pressure or coercion used in obtaining statements, whether written or oral, may consist in depriving a person of food and water, or depriving him of his liberty, or depriving him of his right to consult with counsel. If the jury finds from the evidence that the statement of Paul Echeles was so obtained, then it shall not consider such statements for any purpose" (R. 597, 624).

cross-examined to some extent as to the circumstances of the confession (R. 351, 358, 366–372), but no testimony was elicited as to threats, coercion, lack of food and water, or inability to consult with counsel. Paul Echeles did not take the stand.

As the judge pointed out in refusing petitioners' requests on the confession (R. 597), petitioners did not have Paul testify to circumstances that would raise the issues of voluntariness which the requested instructions posed. As the record stood, there was no evidence before the jury which would raise the issues framed in counsel's requests. And since there was no evidence to support the terms of the requested instructions, the court properly refused them. Cf. *Hawkins* v. *United States*, 158 F. 2d 652, 653 (C. A. D. C.)

e. Petitioner Julius Echeles claims (Pet. 22-25) that the court erred in giving the following charge over his objection (R. 617, 622):

> The statements of Max Lewis and Paul Echeles are in no way to be considered as any evidence against the defendent Julius L. Echeles.
>
> I am referring to their written statements which have been received in evidence.

It is said that this erroneously raised an implication that oral declarations of Lewis and Paul might be binding upon Julius.

As the court below points out, however, when defense counsel were asked if they could point out any oral statements by Lewis or Paul concerning Julius, they were unable to do so. Lewis did not mention Julius in any statement, written or oral, and Paul's oral statements were incorporated into his written confession, which was introduced in evidence and was excluded from consideration by the jury as to Julius (Pet. App. 74).

It is nevertheless contended that the oral statement by Paul (not incorporated into the written confession) to the two postal inspectors that the appointing official mentioned in Paul's confession was Haderlein, the postmaster, was prejudicial to Julius (Pet. 24). However, when inspector Smith began his testimony as to Paul's oral statements before the written confession (R. 345–347), the jury were told that the testimony was not admissible against Julius (R. 345).

8. Petitioners' final contention that they were denied a fair trial (Pet. 42–45) is not supported by the record.

a. It was not abdication of the function of the court to hear the views of both sides before making a ruling. Of the instances cited by petitioners, some were outside the presence of the jury (R. 82, 83, 122, 267, 446); in others, the rulings related to defendant Lewis alone (R. 108, 128, 130, 446, 454). Sometimes, the court's ruling was even favorable to either one or both petitioners (R. 126, 318–319, 335–336).

b. There was no abuse of the trial court's discretion with regard to the scope of examination of cross-examination. Petitioners complain particularly of the trial court's refusal to permit Paul's wife to testify to her conversation with Paul when he telephoned from the office of the postal inspectors (*supra*, pp. 10–11), arguing that such testimony would have shown the involuntariness of the confession (Pet. 43). However, Paul's statements to his wife at 7:30 p. m. would not prove what went on before that time when the confession was made. Paul was the person to have testified regarding the voluntariness of the confession, but, as noted above, Paul did not, as counsel had stated he would, take the stand to testify to the alleged coercion.

Other cited examples of allegedly prejudicial limitation of cross-examination include instances where defense counsel argued with the witness (R. 100, 157, 163); went beyond the scope of the direct examination (R. 91, 92; see also R. 565–566); read from documents not in evidence (R. 93–94, 95, 287); asked immaterial questions (R. 203, 228–229, 375–376); posed questions calling for conclusions of the witness (R. 162, 186, 226); and himself gave gratuitous testimony for the purpose of prejudicing the jury (R. 164, 167).

c. The instances of allegedly prejudicial action by the prosecutor are trivial. The question asked of Haderlein as to whether, if Paul said he paid money for promotions, that would be a lie (R.

491) was not objected to, and did not, as petitioners claim, carry the implication that Paul made statements other than that proved. When a defense witness was cross-examined as to whether he had taken a lie-detector test, the prosecutor stated (R. 509):

> I am not introducing anything about results of a lie detector test. I want to know what statements he made at various times, Your Honor.

The prosecutor's statement that he remembered that the judge had told the jury that the weight of the confession was for them (R. 627) was based on his recollection, and while that recollection was inaccurate as to the exact statement, the essence of the instruction was, as we have discussed, *supra,* pp. 24–25, covered in the charge. Certainly there is nothing in petitioners' allegations which shows misconduct of the type condemned in *Berger* v. *United States,* 295 U. S. 78, 89.

CONCLUSION

The decision below is correct and does not call for further review. Petitioners' challenges to the trial are without merit. The guilt of both petitioners was so overwhelmingly shown by the evidence that the few minor instances in a long trial of alleged irregularities as to which there may be some doubt were clearly not substantial error, if error at all. *Kotteakos* v. *United States,* 328 U. S. 750, 764; *Lutwak* v. *United States,* 344 U. S.

604, 619–620; Rule 52 (a), F. R. Crim. P. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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IN THE

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vs.

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Respondent.

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Petitioners' Reply to Brief of United States

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Petitioners' Reply to Brief of United States

The petitioners reply herewith to the points in the order in which they were raised in the Petition.

The appropriate pages of the government's reply brief are set out next to each heading.

I.

Count 13 of the indictment is duplicitous in that it charges both a felony and a misdemeanor. (Pet. 11-15; G. Br. 12-13)

We complained (Pet. 13) that the reviewing court decided this question on the basis of the conspiracy law as it existed prior to the 1948 enactment. (Opinion, Pet. Appendix 68). The reviewing court quoted from *Braverman* v. *United States*, 317 U.S. 49, 54, that:

> "The single agreement is the prohibited conspiracy, and however diverse its objects it violates but a single statute, Sec. 37 of the Criminal Code. *For such a violation, only the single penalty prescribed by the statute can be imposed.*" (Emphasis added)

The government argues (G. Br. 12) that the change in punishment does not alter the *Braverman* rule. But it is obvious from the language quoted above that the *Braverman* rule draws its force from the singleness of penalty under the old statute. Thus, Braverman is vitiated and superseded by the 1948 statute (Sec. 371, Title 18, U. S. Code).

That the government understands the nature of our objection, is evidenced by its admission (G. Br. 13) that an issue could arise ". . . as to what punishment the court could impose . . ." where both felonies and misdemeanors are conspiratorial objects. The government hence admits the very nucleus of our position, *viz.*, that different punishments could be imposed. Whether or not a defendant could be subjected to separate punishments for offenses if charged in separate counts, determines whether or not a single count charging the offenses is duplicitous. *Creel* v. *United States*, 8 Cir., 21 F. 2d 690, 691; *Bratton* v. *United States*, 10 Cir., 73 F. 2d 795, 797; *Ammerman* v. *United*

States, 8 Cir., 216 Fed. 326, 329; *John Gund Brewing Co.* v. *United States,* 8 Cir., 204 Fed. 17, 21.

As we demonstrated (Pet. 14), under the holding of the reviewing court, upon proof of a misdemeanor only, the way is open to impose a felony punishment. The government now appears to agree with our reasoning, but disputes our right to challenge the rulings below. The government's theory is that the penalty imposed herein was within the permissible limits for a misdemeanor conspiracy.

The government's answer begs the question. First, the penalty imposed was also within the permissible limits for a felony. Second, a defendant cannot be required to await sentence to first discover whether he was being tried for a felony or a misdemeanor. Third, the sentence actually imposed is irrelevant, the sentence which might have been imposed being determinative (Sec. 1, T. 18, U. S. Code). Fourth, the court cannot by its sentence go behind the general verdict of the jury to determine just what the jury had in mind, *Ammerman* v. *United States,* 8 Cir., 216 Fed. 326, 329. Fifth, petitioners do not now know whether they are felons or not under count 13. More is at stake than the severity of punishment, for additional penalties adhere to felony convictions.

We respectfully urge that the admission of the government (G. Br. 13) that a variety of penalties might be imposed under a conspiracy count as drawn here, fortifies our insistence (Pet. 13-14) that the question we raise is of such importance, novelty, and wide applicability, that this Court ought to grant review thereon as a case of first impression.

II.

The trial court erred in its charge to the jury. (Pet. 15-26; G. Br. 22-27)

A. Presumption of Innocence Instruction (Pet. 15-18; G. Br. 22-23).

The reviewing court held that the instruction of which we complained was in itself adequate. We demonstrated its inadequacy in our Petition. The government does not contend in this Court that the reasoning of the reviewing court was sound, nor does it contend that our interpretation of the language of the instruction (Pet. 16) is improper. The government rather adopts the views:

1. That error was not preserved as required by Rule 30, Federal Rules of Criminal Procedure. The reviewing court did not erect Rule 30 as a bar to our objection hereunder, although raised by the government below.

When the government requested the instruction in the trial court (R. 574) we made extensive objections (R. 574-576) which are identical to those now urged. The judge was thus fully apprised of the objection prior to the jury's retirement, as required by Rule 30. Understanding our objection, the judge promised to repair the defective instruction:

> "The Court: Well, trust me to try to fix it up . . ." (R. 576).

Thereafter, when the court was asked pursuant to Rule 30, to state his proposed action upon the requested instructions, he refused to do so (R. 601).

Surely it was owing to the nature of our objections and the court's action in the trial that the reviewing court felt that Rule 30 did not bar us.

2. The government contends that because other instructions were given, petitioners were not entitled to the presumption of innocence instruction (G. Br. 22-23).

Not one of the instructions referred to by the government (G. Br. 22-23) meets our objection. That the jurors were explicitly informed as to the nature of each count and that the defendants might be found guilty or not guilty thereunder did not preserve to the defendants their right to be presumed innocent of each of said counts.

That the court charged that the defendants were presumed to be innocent of the conspiracy charge did not preserve to the defendants their right to be presumed innocent of the twelve preceding substantive charges.

That the reasonable doubt charge was given did not preserve to the defendants their right to the presumption of innocence. *Coffin* v. *United States*, 156 U.S. 432, 452-461. In *Dodson* v. *United States*, 23 F. 2d 401 at 403, the court said:

> "The charge on the burden of proof was correct, but it is settled that failure to charge on the presumption of innocence is not cured by a correct charge on burden of proof. *A fortiori*, a charge which minimizes the presumption, or which allows the jury to ignore it in their final consideration of the case, is not cured by such a charge".

Our objection in the case before this Court is that not only did the court fail to give a proper charge, but that active injury resulted from the charge as given in that it *expressly* enjoined the jury to deprive the petitioners of the benefit of the presumption of innocence when the jury should find, beyond a reasonable doubt, that one defendant was guilty of an offense charged in one count.

The government ignores this objection. If the rule adopted by the Seventh Circuit in this case is permitted to stand, defendants may confidently expect henceforth to be deprived of the force of the presumption of innocence.

B. The court erroneously refused to instruct that one accomplice cannot corroborate another. (Pet. 18-19; G. Br. 23-4)

The government, at its Br. 23-24, deletes from R. 595 the entire remarks regarding the erroneous refusal of the court to instruct as requested.

We maintained there, *as a matter of law,* and we maintain here, that under the cases cited in our Petition, no accomplice corroborates another accomplice, and that it was error to refuse the requested instruction.

Notwithstanding accomplices do not corroborate each other as a matter of law, they may seem to the jury to corroborate each other. It is for that very reason that the instruction was requested. Even reviewing courts may mistakenly hold that one accomplice in fact corroborated another accomplice. The opinion of the reviewing court in this case (Pet. Appendix 66), held that defendant Julius was identified by virtue of the corroborative effect of the testimony of accomplice witnesses. Again, at Pet. Appendix 63, the testimony of accomplice Lazik was corroborated (according to the Court of Appeals) by the testimony of accomplice Stern.

In view of the voluminous accomplice testimony in this case, we think it essential that the instruction should have been given, as requested.

C. The trial court erred in failing to instruct that the weight to be given a confession was for the jury. (Pet. 19-20; G. Br. 24-25).

The government (Br. 24) again points to another group of instructions which it feels adequately replaced the instruction erroneously refused.

Our point is that the court having admitted the alleged confession of Paul Echeles into evidence, it ought, upon request, to have advised the jury of its powers with respect to its consideration of the written confession. We think it likely that jurors, like other laymen, are more deferential to the written word than the spoken.

The requested instruction would have advised the jury of the fact that they might properly refuse to assign any sacrosanct status to the alleged confession of Paul Echeles; that they might assign such weight to it as they saw fit; that the naked fact of its having been received physically into evidence did not make it binding upon their consideration of all the evidence.

The government does not deny the request stated the law. The government cannot point to another instruction that covered the specific matter.

We remind the Court that the Court of Appeals has not reviewed this claimed error (Opinion, Pet. Appendix 47-76). If the error is to be reviewed at all, your Honors must now undertake to do so.

D. The question of whether or not the confession of Paul Echeles was voluntarily made should have been sent to the jury under appropriate instructions. (Pet. 20-22; G. Br. 25-26).

In our petition we cited a number of cases setting out the authority for the above claimed error. The government does not dispute the holding in the many cases cited, but contents itself with stating that there was no evidence to support the terms of the requested instructions.

But the rule is, that so long as there is *some* evidence to support a requested instruction as to matters upon which the defense relies, an instruction should be given.

A government witness postal inspector testified that he told Paul's secretary that Paul would not return to his office (R. 370) although the secretary insisted that Paul was definitely expected to return at 4:00 P.M. (R. 467-8). Can we not infer therefrom that Paul's detention was involuntary?

The same witness testified that although Paul was permitted to call his wife, he the postal inspector, monitored the call and would have cut Paul off had Paul said something not to his liking (R. 371). Surely that testimony implies that at least some of Paul's acts and utterances in the presence of the inspectors were not voluntary. And can we not infer from that fact, the reasonable possibility at least, that the alleged confession was one of those involuntary acts or utterances? If, as we contend, those inferences may reasonably be drawn, then a jury question is created by the evidence, *viz.;* "Was Paul Echeles' confession voluntary?"

Once the existence of the jury question has been established, an instruction thereon is appropriate. The reviewing court admitted that

> "... it became a question for the jury as to whether or not it was voluntarily given; if so, it was for the jury to give it such weight as the jury thought it was entitled to receive." (Opinion, Pet. Appendix 59)

But how was the jury to know what its powers and duties were with respect to the alleged confession without the guidance of an appropriate instruction?

Parenthetically, we remind this Court that stronger evidence might have been adduced on the defense side to warrant our demand for the instruction, had not the trial judge himself refused to permit Belle Echeles to testify to Paul's telephone statements made in the presence of the

inspectors (R. 466), and had not the trial judge himself refused to permit her to testify to Paul's physical condition when the inspectors released him (R. 467), after his nine hour detention.

It is significant that the trial judge refused both the instruction as to the voluntary character of the confession and the instruction advising the jury that the weight of the confession, regardless of how obtained, was for the jury to determine.

In a case such as this where both the reviewing court relied and the government relies heavily on the details of Paul's confession to bolster nearly every count in the indictment, particularly Counts 11 and 13, were not the defendants deprived of a fair trial according to due process by the trial court's failure to instruct the jury as to its consideration of the confession?

E. The oral statements and admissions of petitioner Julius' co-defendants were erroneously permitted to be considered against him. (Pet. 22-25; G. Br. 26-27).

We cited cases in our Petition (p. 25) holding that the statements of a co-defendant outside the presence of an absent defendant could not be used against the latter. The government, adopting the reasoning of the reviewing court, argues that so long as petitioner Julius was not mentioned by name in the oral statements of his co-defendants, he cannot complain that the trial court, in effect, instructed the jury that oral statements of his co-defendants could be used against him. The government cites no cases in support of its view. Neither did the reviewing court.

We invite this Court's attention to the fact that evidence vital to the establishment of the *corpus delicti* of Counts 11 and 13 was provided by such oral statements. The oral

statement of Paul Echeles that the official referred to in the statement was postmaster Haderlein provides the only clue in the entire record as to the identity of the official. If his identity were not shown as charged in the indictment, the failure of proof as to Count 11 would be total.

The government argues (G. Br. 27) that "The jury were told that the testimony [as to Paul's oral statements] was not admissible against Julius." The government's position is, therefore, that the judge need not have instructed the jury properly at the end of the case, the proper time for the judge to instruct the jury as a guide to their impending deliberations. If the judge's comment to the jury (R. 345) relied on by the government now, was a proper instruction, then what was the jury to do when the judge *improperly* told the jury that it was not to consider the *written* statements of Julius' co-defendants, and then pointedly excluded oral statements from the force of the limitation (R. 617)? Is it the government's contention that if the court made a correct comment to the jury upon a vital point during the course of the trial, his subsequent erroneous instruction on that same vital point would not harm the defendant? However, we dispute what the government says with respect to what the jury was told during the course of the trial. When Inspector Smith began his testimony regarding conversations between himself and Paul Echeles, the following occurred (R. 345).

> "Mr. Finn: May this be excluded as far as the defendant Max Lewis is concerned?
>
> Mr. Cohen: It is offered only as against the defendant Paul Echeles.
>
> The Court: Then I take it it is not against the defendant Julius Echeles either.
>
> Mr. Cohen: Yes, that is right.
>
> The Court: You may so consider it, ladies and gentlemen."

Even this mild admonishment was subject to misinterpretation by the jury because, instead of the court's telling the jury that it might not consider the statement, the court told the jury: "You may so consider it . . ."

Prior thereto, the judge expressed confusion *before the jury* when he stated that he did not think that *oral* admissions of a co-defendant need be limited to the person making them. (R. 319, bottom).

In our Petition we cited this Court's opinion in *Blumenthal* v. *United States,* 332 U.S. 539 at p. 552, wherein this Court said that in that case the rulings of the trial court told the jury *plainly* to disregard the admissions of the co-defendant *entirely* in every phase of the case. Here, where a severance was requested and denied, where erroneous instructions regarding the two co-defendants' statements were given to the jury, was not defendant Julius deprived of his right to a fair trial according to due process of law by the failure of the court properly to instruct the jury on this point?

We ask this Court for review, that it may compare the erroneous holding of the court below with this Court's holding in the *Blumenthal* case.

III.

Defendant Julius Echeles should have been granted a separate trial on his motion for a severance. (Pet. 26-29; G. Br. 14-15).

The government has two replies to the claimed error. First, that the motion for the severance was abandoned in a pre-trial colloquy in the judge's chambers (G. Br. 11-12); and that even if there were a renewal of the motion for the severance that the court did not abuse its discretion in denying it.

A. As to the contention that petitioner Julius abandoned his motion for severance (G. Br. 14) we refer the Court to Record 76-78. Julius' motion for severance had already been denied (R. 14-15). Then, just before trial, the prosecutor (not the defense) asked for a conference. There the prosecutor asked the court to determine whether petitioners were satisfied to have the same attorneys represent both of them, representing to the court that there might well be conflicts of interest between petitioners in the course of trial (R. 74, 76-77).

Far from abandoning the motion to sever, the defense quickly renewed the motion (R. 77, top):

> "Mr. Stewart: On that statement, you must remember that we moved for a severance for the lawyer defendant, and if the District Attorney is now disturbed, we renew our motion, then we will have something before the Court to decide."

The defense shortly alluded to that language as making the only motion then before the court (R. 77, bottom).

The reviewing court said of the conference (Opinion, Pet. Appendix, 52):

> "It is clear that neither . . . attorney representing Julius made any motion on that occasion for a severance."

From which we can only infer that the reviewing court overlooked the presence of the above statement in the Record. The government however, has that language before it (Pet. 26-27). How then can the government suggest that the motion was abandoned?

B. The government further contends that no prejudice resulted to Julius from the denial of the severance because "it must be presumed that a jury will follow the court's instructions to disregard admissions by one defendant as against another" (G. Br. 15).

The fault in the government's answer lies in the fact that the trial court did not so instruct the jury. Instead of instructing generally that the statements of Julius' co-defendants should not be considered against him, the court pointedly and explicitly confined the charge to written statements (R. 617). Thus the jury was free under the court's instruction, to use the oral statements of Julius' co-defendants against him. Had a severance been granted, this situation could never have developed.

In *Schaffer* v. *United States,* 221 F. 2d 17, decided April 8, 1955, one of two joint defendants made a statement implicating the other. Severance was denied. The Fifth Circuit said in reversing:

> "The court, of course, *properly* instructed the jury to consider the confession as evidence against Schaffer alone, and to disregard it as evidence against Devenny . . . Like the Seventh Circuit in the case of *United States* v. *Haupt,* 136 F. 2d 661, 672, 'we doubt if it was within the realm of possibility to limit its consideration of the damaging effect of such statement merely to defendant against whom they were admitted'. We hold, therefore, that the court erred in denying the appellant Devenny a separate trial".

Notwithstanding the *proper* limiting instruction in the *Schaffer* case (compare the instruction here admitting oral statements) the court reversed for failure to grant a severance.

Considering the matter only with respect to count 11, the harm to petitioner Julius resulting from the refusal to sever his case, is obvious. Had there been a severance, Paul's alleged confession could not have been introduced before the jury that tried Julius.

Petitioner Julius was charged in Count 11 with promising $350.00 to one John Haderlein. Outside Paul's confession

(not admissible as to Julius) there was a total failure of proof as to: a promise; to Haderlein; of any particular sum of money.

The government was required to establish each such element as to Julius by competent evidence. Absent proof of a promise, the prohibited activity is missing. Absent proof of identity, the official character of the promisee is missing. Absent proof of the amount promised, the punishment cannot be imposed since the permissible fine is a function of the amount promised, so that failure to prove the amount alleged works a fatal variance of a material allegation. (See *United States* v. *Glazer*, 129 F. Supp. 285, 291)

The only evidence in the entire record which might be construed to be promissory (which we dispute) occurs in Paul's alleged confession.

The only evidence in the entire record establishing the identity and official character of Haderlein as the person to whom money was allegedly paid occurs in Paul's alleged confession and oral admissions.

The only evidence in the entire record showing payment of a sum certain occurs in Paul's alleged admissions.

None of that evidence, highly prejudicial as to Julius, would have appeared before the jury in a separate trial.

The dissenting judge below, with his many years of experience as an appellate judge, clearly saw and expressed the resulting prejudice to Julius:

> "It appears to me that the defendant Julius Echeles, was in all probability seriously prejudiced by statements of his co-defendants offered in evidence, and denial of the motion for a severance can hardly be excused . . ." (Opinion, Pet. Appendix 75)

IV.

The confession of Paul Echeles was illegally obtained and it was error to admit the same into evidence. (Pet. 29-31; G. Br. 15-16).

The government denies that there was an arrest of Paul Echeles on the ground that postal inspectors, in order to make an arrest, were first required to get permission from the United States Attorney, which was not done here (G. Br. 16, n. 2). What the government means is that since the inspectors acted in violation of their own rules, the *de facto* arrest made is not that kind of arrest contemplated by those rules, *viz.*, a legal arrest. It is just this of which we complain. Paul was illegally arrested. His alleged confession occurred during the illegal detention following that arrest.

Rule 5, Federal Rules of Criminal Procedure, was sidestepped by releasing Paul immediately after that confession. He was indicted many months thereafter. Would this Court hesitate, for a moment, had Paul been carried before a magistrate immediately following the long detention? The violation in that instance would be clear. Here, the act of first releasing Paul, then permitting months to pass prior to indictment, obscures the violation. But the fog is dissipated by the government's candid admission that there was no *legal* arrest (and hence, we infer, no obligation to take Paul before the United States Commissioner per Rule 5).

The government also contends that Paul's statements were voluntary. As to that we refer in part to our Petition, pages 29-31. But there is additional evidence as to the forced character of Paul's confession. That evidence was elicited by the government upon cross examination of a defense witness.

The prosecutor was inquiring of defense witness Haderlein concerning the truth or falsity of matters in Paul's confession. Witness Haderlein stated that Paul had told him that his (Paul's) answers to the inspectors were forced.

"Q. They were forced?

"A. Yes." (R. 491)

We ask your Honors to review this case on the important constitutional point raised herein, and in our brief under the same head.

V.

Petitioners were deprived of their right to compulsory process as guaranteed by the Sixth Amendment. (Pet. 32-35, G. Br. 16-20).

The government's answer to this point confuses all the subpoenas hopelessly. The government misstates the Record because the government is confused as to what subpoenas are referred to in various places in the Record, and in our Petition.

We stand on the arguments made in our Petition, but feel constrained to reply in order to disentangle the distortions (we think unintentional) introduced by the government's brief.

The subpoena calling for personnel files of all postal employees recommended for promotion during the tenure of postmaster Haderlein appears at R. 23-24. (See Pet. 32). The subpoena was quashed (R. 82) and a formal order of quashal entered on February 8, 1954 (R. 25). That this was the subpoena quashed follows from the fact that the order of quashal designates the subpoena as the

one returnable on February 1, 1954 (R. 25), the Record further disclosing that to be the only subpoena returnable on that day.

The government's remarks in the paragraph commencing at the bottom of their brief at p. 17 and in paragraph "a" commencing at the bottom of p. 18, have no application to the above described subpoena so quashed, although they purport to.

In those paragraphs of the government's brief, the government refers to pp. 122-125 of the Record, apparently believing them to have reference to said quashed subpoena. Record 121 to the middle of 124 is devoted exclusively to our subpoena demanding production of the personnel jackets of named government accomplice witnesses, that subpoena appearing at R. 22-23. It was that subpoena upon which the court declined (R. 83, 124) to require production until (R. 270) five of the six government accomplice witnesses to which the subpoena referred, had already testified and left the stand. The remarks of the prosecutor (R. 122) make it clear that this was the subpoena being discussed at R. 121-124, not the subpoena that had been quashed the day previously (R. 82-25).

The government erroneously says that the subpoena for the personnel jackets of named government accomplice witnesses was served "later in the trial" (G. Br. 18). That is not true. The subpoena was served, as disclosed by the return thereon, on February 8, 1954 (R. 23). Following its service, the defense never stopped demanding production thereunder (R. 82, 121-124, 269-271). At R. 82 specific reference is made to "the personnel jackets of the individuals named in the indictment". At R. 122, the prosecutor establishes the identity of the subpoena under discussion as the subpoena seeking the personnel jackets of named government accomplice witnesses. Production

was finally granted at R. 270 after the witnesses to whom the documents sought related, had left the stand. The only subpoena that was served "later in the trial" (G. Br. 18) was a subpoena, about which no point is here urged, served on behalf of the co-defendant Lewis (R. 265, order thereon R. 25-26).

The government believes also that our subpoena for the political personnel files of government accomplice witnesses was served "later in the trial" (G. Br. 18). That subpoena (R. 22-23) was served prior to the trial, on February 8, 1954, as appears from the return thereon (R. 23).

We believe the Court will be well advised to accept the descriptions of the various subpoenas as set forth herein and in our petition, pp. 32-34 rejecting the government's erroneous designations.

Since the remarks of the government (G. Br. 16-20) do not apply to the subpoenas to which they might be germane, we can only treat them as generalities about the law of subpoenas. The government seems to take the position that the prosecutor can demand, before production, that the defendant in a criminal case can be required to demonstrate exactly wherein documents sought to be subpoenaed are material to his defense. That is not the law. *U. S.* v. *Burr,* 25 F. Cas. 187, 191; *Gordon* v. *U. S.,* 344 U.S. 414, 418; *United States* v. *Terminal Railroad Association,* 148 F. 486, 489.

We do not claim, as the government would have the Court believe (G. Br. 19) that the fact that another person recommended one of the government accomplices for promotion would bear on the issue of whether petitioners received money for arranging such promotion. We stated (Pet. 34-35) and reiterate here, that if, as the Court of Appeals has held, the *fact* of promotion is corroborative

of the view that such promotion was the fruit of an improper promise (Pet. Appendix 63-64) then we were entitled to documents (the so-called political personnel files) showing that the promotions in question were in fact the product of other considerations, thus counteracting the effect of the supposed corroboration.

In denying our subpoena for the political personnel files, the trial judge indicated a preference to protect unnamed politicians rather than to protect the defendants on trial (R. 267-269). We submit that the core of the court's refusal lay in that area, notwithstanding "materiality" was the reason articulated.

VI.

Is a promotive office an appointive office or place as contemplated by Sec. 215, Title 18, U. S. Code? (Pet. 36-37; G. Br. 13-14).

In our Petition (p. 37) we cited a number of cases holding that "promotion" and "appointment" are not synonymous. The answer of the government is to cite *United States* v. *Jacobs,* 116 F. Supp. 928. But that opinion was written by the judge who tried the instant case. The government could as well cite as authority sustaining the court's refusal to quash the indictment here, the court's own ruling in this case.

Even in the *Jacobs* case there is no citation to a decided case to support the view that appointments and promotions are the same, as against all of the cases cited by the petitioner herein. Jacobs, an attorney, was indicted for receiving money to obtain promotions for postal employees in the Chicago postoffice. Jacobs was never brought to trial, the case being dismissed upon the government's motion. The case never having gone beyond the pleading stage, the opinion cited by the government

now, was never subject to review. The case accordingly stands for little.

The dismissal is set out in the files of the Clerk of the District Court for the Northern District of Illinois on November 30, 1954 in Case No. 52 CR 551.

In addition to the authorities cited, all of which hold that promotion and appointment are distinct and separate concepts, the *Jacobs* case is inapplicable for other reasons. The evidence in this case showed that the promotive jobs were already held by the individuals in question (R. 135, 180, 222). They had the jobs and were performing the duties. They did not have the pay. *U. S.* v. *Jacobs, supra,* therefore, cannot be controlling.

The government also cites *United States* v. *Hood,* 343 U.S. 148. That case does not overrule the holdings of this Court in *U. S.* v. *Wietzel,* 246 U.S. 533 and *U. S.* v. *Harris,* 177 U.S. 305, both of which cases are cited in our petition pp. 36-37. The *Hood* case has no application here because of the different factual situations.

This Court ought to grant review on this point, the question not having previously been passed upon by the federal courts, although decided frequently in the several states in accord with petitioners' contentions.

VII.

The defendants were not identified as to several counts. (Pet. 37, 38; G. Br. 20)

The government cites *United States* v. *Fujii,* 55 F. Supp. 928, 930 to the effect that identification is not necessary. The trial judge in that case said:

> "For the defense it is mildly suggested that there was no identification of each individual defendant on trial . . ."

The trial court then pointed out that there were several identifications made in open court, that further, the defendants' finger prints were introduced and their signatures were attached to their finger prints. The government would leave the impression that the *Fujii* case was reviewed on the point of identification. It was not. The review reported in 148 F. 2d 298 was on a completely different point and the question of identification was not raised in the reviewing court. In the other case cited by the government, *Ryan* v. *United States,* 99 F. 2d 864, 870, the question of identification is neither raised by the defendant nor commented upon by the reviewing court. The case is wholly inappropriate. The question there was whether the *corpus delicti* of the crime was proved.

The government makes the further point that Paul and Julius identified themselves as defendants at the arraignment. So does every defendant in every criminal action when his case is called for trial. Does this mean, therefore, that there need never be any identification of an evidentiary nature of the defendants at the actual trial?

The government also contends that the defense made no attempt to cross-examine to show that the witnesses were unable to identify the defendants. Is the defense required to cross-examine on a point where there is a total failure of the government's proof?

We submit that it is the government's function to prove that the defendant on trial is the one who committed the offense charged in the indictment, and that it failed to do so as to Counts 4 and 5.

VIII.

The government failed to prove that any offense was committed as charged in Count 11 of the indictment. (Pet. 38-42; G. Br. 21-22).

The petitioners' argument under this point was separated as to Julius and as to Paul. The government's answer as to the insufficiency of evidence as to Julius is that "there was ample evidence to justify the inference that he was a party to a scheme to pay money for promotions" (G. Br. 21).

The government wholly misapprehends the offense charged. Julius was found guilty of the offense of *promising* to pay one John Haderlein the sum of $350. That is the crime charged under Sec. 201, Title 18. There is no such crime as a "scheme to pay money for promotions."

It was pointed out as to Julius, that there is a fatal lack of proof as to this count (Pet. 39-40). In the case of *United States* v. *Michelson,* 165 F. 2d 732, the Second Circuit, through Judge Frank, reversed a conviction on a count of an indictment charging that the defendant offered to pay a bribe to a public official. The Court of Appeals decided that ". . . the Congress, as it lawfully may, provided that to 'offer' a bribe and to 'give' a bribe are two distinct crimes . . ."

If it is a separate crime to promise money and a separate crime to give money, *U. S.* v. *Michelson, supra,* proof of the giving of the money is not proof of a promise. Here, however, there is a complete absence of any proof, competent as to Julius, that Haderlein was promised or received any money from anyone. Nor is there any "indirect" evidence as the government would have the Court believe. (G. Br. 21).

The government seeks to make it appear that our complaint as to count 11 is insignificant, as merely affecting a $250.00 fine. But count 11 is the only substantive felony of which the petitioners stand convicted. Further the *amount* of the fine here provides another reason why reversal is imperative for failure of proof as to petitioner Julius.

Section 201, Title 18, U.S. Code, makes any fine imposed a function of the amount promised. Where a sum certain is alleged therefore, the allegation is extremely material in that the permissible punishment hinges thereon. Accordingly, a variance from that material allegation results in a failure of proof.

Thus, in acquitting the defendant in *United States* v. *Glazer*, 129 F. Supp. 285, wherein the indictment charged an offer of $100.00 to a government inspector who was unable to specify the exact sum in fact offered to him, the court held there was a fatal variance, saying:

> "This variance and failure of proof is pertinent in a prosecution under 18 U.S.C. Sec. 201, which provides for a fine of 'not . . . more than three times the amount of such money . . .' In view of this provision of the statute, it is incumbent upon the government to allege and prove the amount of money offered. Absent such proof, it is impossible to ascertain the amount of the permissible fine which any judge could impose under the statute. The judge would have to guess before applying the multiplier."

There is not a single word of evidence applicable to Julius showing the amount charged to have been promised.

As to Paul the evidence similarly is insufficient for the reason that *outside* the *confession* there was not a word of proof to justify the inference that Paul promised money to Haderlein. The named official took the stand and denied

that Paul either offered or gave him money for any purpose (R. 472-491).

Both *Opper* v. *United States,* 348 U.S. 84, and *Smith* v. *United States,* 348 U.S. 147, cited by the government, held there was evidence outside the confession to prove the *corpus delicti* of the crime. Here, the crime charged under Count 11 was a promise by Paul to pay money to one John Haderlein, the postmaster.

Even Paul's confession shows no promise to pay Haderlein money for Lazik. It shows, if it shows anything, (R. 340) a payment. As shown above, a payment of money under Sec. 201, is a separate crime from a promise or offer of money under Sec. 201. See *United States* v. *Michelson, supra.* Under the *Michelson* and *Glazer* cases, *supra,* the proof must conform to the indictment and it is not enough if there is just a "scheme to pay money for promotions". There must be shown a definite *promise* of a definite *amount.*

For the reasons set forth in our Petition and herein, we submit that this Court should grant certiorari on this point.

IX.

The defendants were deprived of a fair trial by reason of the prejudicial conduct of the judge and prosecutor. (Pet. 42-45; G. Br. 27-29).

The government correctly observes that a judge would not abdicate his judicial function were he to hear the views of both sides before ruling (G. Br. 27). Our objection is that the trial judge here, did not once in the course of this long and involved trial, ask the defense to state its views, although he frequently asked the government for an opinion. The government points to no instance where the

trial judge made such request of the defense. We can find none in the Record, either. But we observe numerous instances of the judicial lapse to which we object, and refer this Court to the Record citations at Pet. 43.

We complained that petitioner Paul's wife was not permitted to testify to matters already gone into by government witnesses (Pet. 43). Belle Echeles' testimony would have been impeaching of and contradictory to that given by a government witness. It would further have demonstrated Paul's detention to have been both unlawful and coercive. The trial judge cut the testimony off *in limine* (R. 466), notwithstanding our offer of proof.

The government answers our objection here by the observation that Paul was the proper person to have testified to the voluntariness of his alleged confession. We know of no rule which permits the government to decide what witnesses the defense will use to prove particular facts.

The defendants were entitled to make proof as they saw fit. The defendants saw fit to rely on Belle Echeles' testimony to establish certain facts for the defense, and to contradict alleged facts relied upon by the government.

The government's present contention would presuppose a rule requiring a defendant to make his denial personally, rather than by witnesses he calls to make that denial for him. The government contends that the court did not abuse its discretion in refusing to permit the defense to make proof of matters vital to it. This Court has held to the contrary. *Edwards* v. *United States*, 312 U.S. 473, 482.

The Court of Appeals declined to review this point in our appeal. That court dismissed our contention with the mere observation that the trial court sustained an objection

to our question to Paul's wife, Belle Echeles (Pet. Appendix 59), *and then said nothing more.*

Therefore, if petitioners are to have a review of this important point, they must look for it in this Court.

As to the other instances of claimed prejudice by the judge and prosecutor, we invite this Court's attention to the comprehensive observation by Chief Justice Hughes in the case of *United States* v. *Wood,* 299 U.S. 123, 145-6:

> "Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula."

We earnestly contend that the psychological atmosphere created by the prosecutor's suggestions that certain things were done which were not done, that a defense witness failed to prove himself on a lie detector, that instructions were given which were not given, was not such as to have provided a fair arena for the trial of this case.

CONCLUSION.

The government asserts in its conclusion that the admitted errors and irregularities were not substantial. A judge of long experience on the Seventh Circuit Court of Appeals, Judge Major, dissented from the majority opinion and stated that he had a strong feeling that the defendants did not have a fair trial, and further declared:

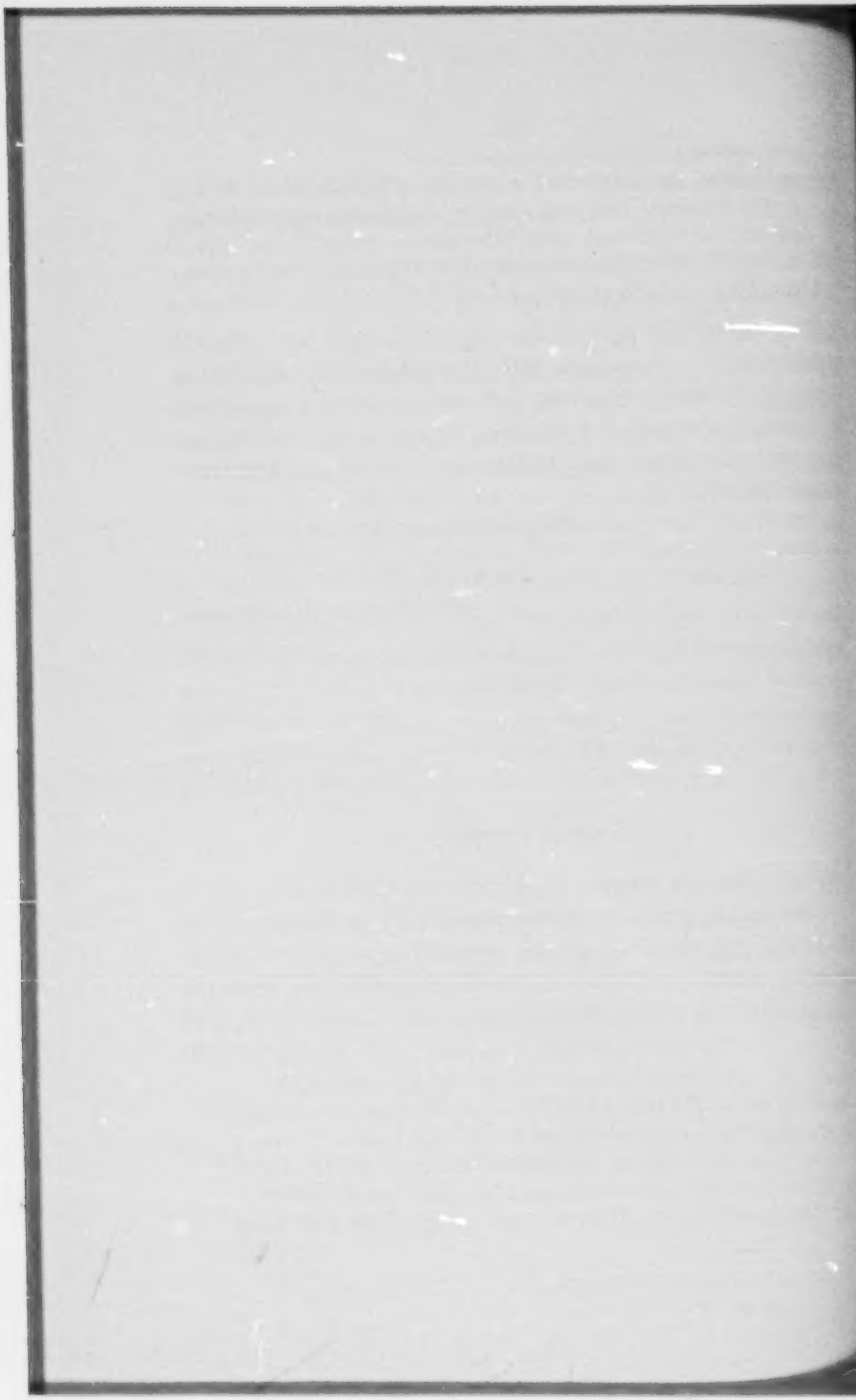
> "The very nature of the case, considering the fact that there were three defendants and a multiplicity of charges, including that of conspiracy, in itself requires, in my view, that the judgment be affirmed only upon a record free from substantial error. Unfortunately, however, we have no such record. Perhaps it can be

said that no single error was so prejudicial as to require reversal but, even so, there was an accumulation of errors sufficient to create grave doubt in my mind as to the fairness of the trial." (Opinion, Pet. Appendix 75).

We respectfully submit that the petitioners were denied a fair trial in accordance with due process of law; that a number of questions raised here are novel and important in the administration of criminal justice in federal courts; and that, therefore, the Petition for a Writ of Certiorari should be allowed.

Respectfully submitted,

FRANK W. OLIVER,
Attorney for Petitioners.



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HAROLD B. WILLEY, Cl

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 135

JULIUS L. ECHELES and
PAUL ECHELES,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR REHEARING FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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To: The Honorable, The Chief Justice And The Associate Justices Of The Supreme Court Of The United States:

Your petitioners Julius L. Echeles and Paul Echeles, respectfully pray that this Court rehear the Petition for a Writ of Certiorari heretofore summarily denied by this Court.

REASONS WHY THE PETITION FOR REHEARING SHOULD BE GRANTED.

Mindful of Rule 58 of the Rules of this Court limiting the grounds upon which to petition the Court for a rehearing, we state that an intervening circumstance of substantial effect has occurred since the filing of the original Petition for Certiorari herein. The United States Court of Appeals for the Seventh Circuit decided the case of *United States* v. *Wall,* Court of Appeals No. 11356, on September 28, 1955. In that case the Seventh Circuit cited its own decision in the instant case, *United States* v. *Echeles,* 222 F. 2d 144 as dispositive of the issue there. Point VI of our argument in the original petition before this Court raised the question of whether a promotive office was an appointive office or place as contemplated in Section 215, Title 18, United States Code. The precise question which was raised in the court below has never been raised in this Court. The Court of Appeals for the Seventh Circuit has now decided a second case, the *Wall* case, *supra,* on the strength of its own decision, without any declaration or opinion from this Court. In the *Wall* case, the defendant was charged with receiving money to obtain promotive jobs. The same issue was raised in the Court of Appeals as was raised here under our Point VI. We cited a series of cases, all to the effect that "promotion" is not synonymous with "appointment". As the court said in *Commonwealth ex rel Maurer* v. *O'Neil,* 368 Pa. 369, 375:

> " . . . Authorities too numerous to mention offer similar definitions and none proposes that the two terms are interchangeable."

In our Petition to this Court (p. 37) we stated that the reviewing court below, in a short comment, held that "appointive office" included "promotive office" (Appendix 69

of Petition for Certiorari). However the court did not cite any cases. It could not, for none exist which support its view. In the *Wall* case it has now cited its own opinion as authority for the proposition to which there were only cases contrary to that viewpoint. It is true that we are not able to cite any federal circuit court cases with which the Seventh Circuit is now in conflict. But it is in conflict with the long line of cases which are set out on pages 36 and 37 of our Petition for Certiorari.

Inasmuch as an interpretation of Section 215, Title 18, United States Code has never been made by this Court, we respectfully submit that for the foregoing reasons this Court should grant the petition for rehearing and upon such ground allow certiorari.

OTHER REASONS FOR THE ALLOWANCE OF THE WRIT.

In the late Justice Jackson's book entitled "The Supreme Court in the American System of Government", Harvard University Press, 1955, the Justice highlighted the practical difficulties of this Court in considering the huge volume of petitions and other applications for relief processed to the Court. Your petitioners are acutely mindful of the difficulties inherent in obtaining a grant of Certiorari—much less a grant of a rehearing on a Petition for Certiorari. We are mindful also of the method by which it is said this Honorable Court reviews Petitions for Certiorari—that is, by a summary digest of the Petition itself. Exclusive of the Appendix, which included the opinion of the lower court and exclusive of the statement of facts, we have presented 34 pages of reasons for allowance of the Writ of Certiorari. We could not encapsule the argument more briefly owing to the number of important points involved. We are hopeful that if this

Court is disposed to grant the rehearing on the point set out above, that it will also consider the other points raised in the Petition. Particularly we beseech this Court to consider the claimed error of the trial court in refusing to grant defendant Julius Echeles a separate trial (Point III of the original Petition), together with the erroneous and prejudicial application by the trial court, of the law of statements made outside the presence of a defendant by his co-defendant. We ask this Court, if it be so disposed, to reconsider our argument with respect to the instructions to the jury (Point II of the original Petition) and our argument as to whether or not the petitioners were deprived of their right to compulsory process as guaranteed by the Sixth Amendment (Point V of the original petition).

Your petitioners are hopeful that they will not finally be left only with the comfort to be derived from the strong language of Judge Major, the dissenting judge in the reviewing court. We reiterate what Judge Major, the judge with the longest experience on the Seventh Circuit bench, had to say of the proceedings in the trial court:

> "It appears to me that the defendant, Julius Echeles, was in all probability seriously prejudiced by statements of his co-defendants offered in evidence. . . ." (Opinion, Original Petition, Appendix 75).

And further

> "I have a strong feeling that the defendants did not have a fair trial. . . . The very nature of the case considering the fact that there were three defendants and a multiplicity of charges, including that of conspiracy, in itself requires, in my view, that the judgment be affirmed only upon a Record free from substantial error. Unfortunately, however, we have no such Record." (Opinion, Original Petition, Appendix, 75).

CONCLUSION.

For the foregoing reasons and for the reasons urged in the original Petition for Certiorari, we respectfully urge that this Court grant a rehearing and that upon such rehearing that this Court grant the Petition for the Writ of Certiorari prayed for.

Respectfully submitted,

FRANK W. OLIVER,
Attorney for Petitioners.

Certificate Of Counsel.

Frank W. Oliver, attorney for petitioners herein, hereby certifies that the within Petition for Rehearing is filed in accordance with Rule 58 of the Rules of this Court and is presented in all good and earnest faith and is not for the purpose of delay; and he further certifies that the petition is restricted to a circumstance of substantial effect.

Frank W. Oliver further hereby certifies that he has mailed three copies of the within Petition to the Solicitor General, Department of Justice, Washington 25, D. C.; and has also mailed a copy of the said Petition to the United States Attorney, United States Courthouse, Chicago, Illinois.

.....

FRANK W. OLIVER